Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1995

JOHN J. CONFORTI,
d/b/a C&C PRODUCE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether admission into the record after a hearing, through official notice under the Administrative Procedure Act (APA), 5 U.S.C § 556(e), of a decision from a case in which Petitioner was not a party and which contained findings of adjudicative facts used against Petitioner by the agency and the court of appeals without notice to Petitioner, violates the Due Process Clause of the Fifth Amendment and the APA?

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PETITION FOR WRIT OF CERTIORARI

Petitioner, John J. Conforti, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered on November 9, 1995, and the subsequent denial of the Petition for Rehearing on January 18, 1996.

OPINIONS BELOW

Revised opinion of the United States Court of Appeals for the Eighth Circuit affirming the agency decision against Petitioner but reducing the suspension of Petitioner's license to operate a wholesale produce business from 90 days to 30 days. (App. 1-11.)[1] Decision and Order of the Judicial Officer of the United States Department of Agriculture suspending Petitioner's license to operate a wholesale produce business for 90 days. (App. 12-71.) Order of the Judicial Officer that official notice be taken of documents from another case. (App. 72-126.)

JURISDICTION

Judgment of the United States Court of Appeals for the Eighth Circuit was entered on November 9, 1995, and a petition for rehearing denied on January 18, 1995. This Court's jurisdiction to consider this petition from the

[1] Twelve copies of the original opinion of the court of appeals, which was changed on rehearing only with respect to one (1) paragraph regarding official notice (App 4-5), have been lodged with the Court.

final judgment or decree by a court of appeals is invoked pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISION

Fifth Amendment, United States Constitution:

. . . [N]or be deprived of life, liberty, or property, without due process of law; . . .

STATUTORY PROVISIONS

(a) *Administrative Procedure Act, 5 U.S.C. § 556(d)*

. . . A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence. . . . A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. . . .

(b) *Administrative Procedure Act, 5 U.S.C. § 556(e)*

. . . When an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary.

(c) *Perishable Agricultural Commodities Act, 7 U.S.C. § 499a(b)(9)*

The term "responsibly connected" means affiliated or connected with a commission merchant, dealer, or broker as (A) partner in a partnership, or (B) officer, director or holder of more than 10 per centum of the outstanding stock of a corporation or association;

(d) *Section 12a, Perishable Agricultural Commodities Act Amendments of 1995, P.L. 104-48, November 15, 1995*

(a) EXCEPTION TO DEFINITION. – Section 1(b)(9) of the Perishable Agricultural Commodities Act, 1930, (7 U.S.C. 499a(b)(9)), is amended by adding at the end the following new sentence: "A person shall not be deemed to be responsibly connected if the person demonstrates by a preponderance of the evidence that the person was not actively involved in the activities resulting in a violation of this Act and that the person either was only nominally a partner, officer, director, or shareholder of a violating licensee or entity subject to license or was not an owner of a violating licensee or entity subject to license which was the alter ego of its owners."

(e) *Perishable Agricultural Commodities Act, 7 U.S.C. § 499h(b)*

Except with the approval of the Secretary, no licensee shall employ any person, or any person who is or has been responsibly connected with any person –

(1) whose license has been revoked or is currently suspended by order of the Secretary;

. . .

(3) against whom there is an unpaid reparation award issued within two years, subject to his right of appeal under Section 7(c) of this Act.

> The Secretary may approve such employment at any time following nonpayment of a reparation award, . . . if the licensee furnishes and maintains a surety bond in form and amount satisfactory to the Secretary as assurance that such licensee's business will be conducted in accordance with this Act and that the licensee will pay all reparation awards, subject to its right of appeal under section 7(c) of this Act, which may be issued against it in connection with transactions occurring within four years following the approval.

STATEMENT OF THE CASE

The United States Department of Agriculture (the Department) filed a complaint against Petitioner, John J. Conforti, d/b/a C&C Produce Co., seeking to revoke his license to operate a wholesale produce company on the ground that he violated section 8(b) of the Perishable Agricultural Commodities Act (PACA), 7 U.S.C. § 499h(b), by employing Joseph Cali, a person whom the Department alleged to be restricted from employment by a PACA licensee. (App. 2-3.) Cali was alleged to be restricted from employment for being responsibly connected to Royal Fruit Company (i.e. an officer, director or more than 10 percent shareholder of the company pursuant to 7 U.S.C. § 499a(b)(9)), when its PACA license was suspended in 1993 for failing to pay certain reparation awards to produce suppliers.

Petitioner denied violating the PACA, and an evidentiary hearing was held pursuant to the APA before an Administrative Law Judge (ALJ) of the Department.

(App. 14.) The ALJ issued a decision finding Joseph Cali responsibly connected to Royal Fruit Company because the Department had "presented evidence showing that Cali was responsibly connected to Royal Fruit." (App. 20-21.) The ALJ cited no evidence in support of this finding. But as a result of this finding, the ALJ determined that Petitioner violated the PACA by employing Cali, and ordered a suspension of Petitioner's PACA license for 30 days. (App. 24.)

The Department appealed the ALJ's order to the Judicial Officer, the final agency authority, in order to obtain a 90 day suspension, and Petitioner cross appealed. (App. 12-13.) No further hearing was held. (*Id.*)

Before rendering a decision on the appeal, the Judicial Officer issued an Order Taking Official Notice, which stated that official notice was being taken of three (3) documents from two (2) contested cases, consolidated and pending before the Department, and identified as In re Royal Fruit Company and In re Midland Banana and Tomato Co., Inc. (App. 72-73.) Petitioner and Cali were not parties in these cases. The documents noticed were: a 36 page Decision and Order containing numerous findings of fact of an ALJ different than the one who presided at Petitioner's hearing (App. 74-113); the complaint filed in the Royal Fruit case (App. 114-123); and part of the testimony of a witness at the evidentiary hearing in the Royal Fruit/Midland Banana cases (App. 124-126). The Judicial Officer did not state why he was taking official notice of these records. In the Order Taking Official Notice, the Judicial Officer gave Petitioner an opportunity "to show the contrary", pursuant to 5 U.S.C.

§ 556(e), when an agency takes official notice of a material fact. Petitioner objected to the Order Taking Official Notice, for, among other reasons, citing no facts which were being officially noticed. (App. 127.)

The Judicial Officer issued a decision and order modifying the ALJ's opinion, and increasing the penalty from a 30 day license suspension to 90 days. (App. 12-71.) In his decision, the Judicial Officer overruled Petitioner's objection to taking official notice of the documents (App. 50, 56), and cited facts from the documents which he utilized to support his order (App. 50-57). The facts the Judicial Officer cited from the noticed documents were for the purpose of showing that Petitioner's employment of Cali was a great risk to the produce industry and therefore merited an increase in the length of the suspension from 30 to 90 days. On the issue of whether there was sufficient evidence to prove that Cali was responsibly connected, the Judicial Officer stated, "However, I find that there is much more than a preponderance of the evidence supporting the Complaint . . . The evidence is adequately summarized in the ALJ's Initial Decision (at 6-7) [App. 20-21], which I have adopted. . . . [B]ut no useful purpose would be served by further discussion of the evidence, in view of the adequate discussion by the ALJ." (App. 27.)

On a petition for review to the U.S. Court of Appeals for the Eighth Circuit, the court affirmed the Judicial Officer's decision, but reduced the suspension to 30 days. (App. 11.) On the issue of whether Cali was restricted from employment by being responsibly connected with Royal Fruit Company, the court cited facts from the documents included in the record through official notice in

order to uphold the finding that Joseph Cali was responsibly connected to Royal Fruit. (App. 3-4.) The court then determined that use of official notice to include the Royal Fruit/Midland Banana documents into the record was proper because Departmental regulations allowed the Department to take official notice of "relevant publications and records of the Department", citing 7 C.F.R. § 47.25(f)(3) (1993),[2] and because the Judicial Officer gave Petitioner an opportunity to object to the official notice as required by 5 U.S.C. § 556(e).

In his petition for rehearing, Petitioner noted that the Department regulation cited by the court of appeals regarding official notice was inapplicable. The court refused to modify its ruling except that it revised its opinion on the issue of official notice. The court noted that the admission of the documents into the record by official notice was not error because Departmental regulations allow the Judicial Officer to notice "such matters as are judicially noticed by the courts of the United States", and that federal courts could judicially notice *sua sponte* proceedings in other courts if they directly relate to the matters at issue. (App. 5.) Thus, the court found that the manner of admitting these documents was a proper exercise of judicial notice in the federal courts.

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[2] From the original opinion of the court of appeals lodged with the Court. See footnote 1, *supra*.

REASONS FOR GRANTING THE WRIT

It is respectfully contended that the use of official notice in this case directly conflicts with applicable decisions of this Court and the APA, and so far departs from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

It is fundamental that a party to an administrative proceeding is entitled to be confronted with the facts relied on by the agency so he is able to rebut them. *Bowman Transportation, Inc. v. Arkansas – Best Freight System, Inc.*, 419 U.S. 281, 288, 42 L.Ed. 2d 447, 457, 95 S.Ct. 438, 443 (1974). *Gonzales v. United States*, 348 U.S. 407, 99 L.Ed. 467, 75 S.Ct. 409 (1955). It is a violation of the Due Process Clause when an agency uses evidence in a way that prevents a party from opposing it. *Ohio Bell Telephone Co. v. Public Utilities Comm'n*, 301 U.S. 292, 81 L.Ed. 1093, 57 S.Ct. 724 (1937); *United States v. Abilene & S.R. Co.*, 265 U.S. 274, 68 L.Ed. 1016, 44 S.Ct. 565 (1924). Noticing facts for the first time in a final decision of the agency is a use of evidence that prevents a party from opposing the evidence and is a violation of the Due Process Clause. *American Trucking Association, Inc. v. Fresco Transportation Co.*, 358 U.S. 133, 3 L.Ed. 2d 172, 79 S.Ct. 170 (1958). The same principles apply to the use of judicial notice. *Ohio Bell Telephone Co. v. Public Utilities Comm'n*, supra.

The APA incorporates these principles by prohibiting the imposition of a license suspension based on facts that are not subject to challenge by the licensee. 5 U.S.C. § 556(d). Facts must be presented either at the hearing or by way of official notice subject to the licensee's right to

know of the facts being noticed and to show the contrary. 5 U.S.C. § 556(e).

In this case, petitioner was denied his fundamental right to contest the facts used against him in violation of the Due Process Clause and the APA. As a result, petitioner's license to operate a produce business was improperly suspended.

At the agency level, the Judicial Officer issued the Order Taking Official Notice to include in the record documents from contested proceedings to revoke the license of Royal Fruit Company and to deny a license to Midland Banana and Tomato Company, both of which were run by Robert Heimann. (App. 72-73.) Neither petitioner nor Cali were parties to these cases, and the records were noticed after petitioner's APA hearing and without citing any facts. The documents consisted of: a 36 page Decision and Order in the Royal Fruit/Midland Banana case, which contained 47 numbered paragraphs of "Findings of Facts", and 21 pages of discussion in which there are additional findings of fact (App. 74-113); the complaint in the Royal Fruit case which contains by its nature only allegations of facts (App. 114-123); and part of the testimony of a Departmental employee at the evidentiary hearing in the Royal Fruit/Midland Banana cases regarding his opinion about an individual's liability for PACA violations (App. 124-126). The Order Taking Official Notice cited a prior Departmental case, *In re Dane O. Petty*, as authority (App. 132), and stated that petitioner was being given an opportunity to "show the contrary" under the APA, 5 U.S.C. § 556(e). However, since no facts were cited in the Order Taking Official

Notice, the opportunity to show the contrary was meaningless. Petitioner objected to this procedure and pointed out that the proposed official notice went way beyond what the Judicial Officer had noticed in the *Dane O. Petty* case. (App. 127, 132.) But the Judicial Officer overruled the objection in his final decision in which he increased the length of the suspension to 90 days using the documents he had officially noticed. (App. 50, 56.)[3] It was only in this decision, which was the final agency action, that the Judicial Officer, for the first time, set forth the facts he was noticing from the documents he had admitted into the record by official notice.

In addition, the Judicial Officer also admitted into the record another document which he had not referenced in the Order Taking Official Notice – part of the agency's brief in the Royal Fruit/Midland Banana cases. (App. 53-56.) In another strange twist, the Judicial Officer utilized this brief to disapprove the ALJ's finding in the Royal Fruit case that Robert Heimann controlled Royal Fruit and that Cali only played a minor role as Heimann's flunky. Thus, the Judicial Officer not only imported the entire Royal Fruit decision into Petitioner's case, and then

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[3] The court of appeals noted that given the daily service requirements of his business, a 90 day suspension would "drive Conforti, a man with a previously spotless record, out of the produce business altogether." (App. 10.) The court, in fixing a 30 day suspension, said this likely would have "devastating financial consequences" on Petitioner (*Id.*), but did not explain why a 30 day suspension will not drive Petitioner out of business as well; and there is nothing in the record to show that Petitioner can survive a 30 day suspension given the daily service requirements of his business.

selected facts from the decision to increase Petitioner's penalty without notice to Petitioner; he also rejected facts found by the ALJ in the Royal Fruit case using a brief that had never been referenced in the Conforti case. He then made his own findings of fact in the Royal Fruit case that differed from the ALJ's findings, and then he used the different facts he found in the Royal Fruit case against Petitioner without notice to Petitioner.

At the court of appeals level, the error was compounded because the court not only approved the inclusion of the documents into the record by way of official notice, it also proceeded to select different facts from the noticed documents to support its ruling that there was sufficient evidence to show that Joseph Cali was responsibly connected to Royal Fruit – a key issue in this case.

Petitioner contended throughout the proceedings that there was insufficient evidence that Cali was responsibly connected to Royal Fruit. The ALJ and Judicial Officer offered conclusory statements that there was sufficient evidence to show Cali was responsibly connected. (App. 20-21, 27.) However, the court of appeals could find no such evidence in the record, for it determined that the only evidence showing that Cali was responsibly connected to Royal Fruit came from a finding of the ALJ in the Royal Fruit/Midland Banana decision included in the record by official notice. The court of appeals stated, " In *Royal Fruit*, the ALJ found that Cali was the president and a director of Royal Fruit Company and that he held 50 percent of the company's stock. Given these previous findings, we believe that the JO was justified in concluding that Cali was responsibly connected." (App. 4.) Neither the Judicial Officer nor the ALJ in Petitioner's case

relied on the Royal Fruit/Midland Banana findings to conclude that Cali was responsibly connected. So the court selected different factual findings from the Royal Fruit/Midland Banana decision than those used by the Judicial Officer to uphold the Judicial Officer's decision on the responsibly connected issue, and but for the admission of these documents into the record, the court of appeals did not have a basis for affirming the agency decision on this key issue. And, once again, the same thing happened to Petitioner at the court of appeals level as occurred at the agency level – Petitioner was confronted with facts used against him after a decision was rendered without an opportunity to challenge the facts.

Not only was this an erroneous procedure on its face. A review of the decision in the Royal Fruit/Midland Banana case demonstrates why, in practice, the admission of this document was improper. The findings in the Royal Fruit case indicate that Cali held the positions of officer and director in 1988, and was a more than 10% shareholder in 1988 and 1991. (App. 78-79.) However, there is no finding that Cali held these positions in the relevant year of 1993 when Royal Fruit's PACA license was suspended for failing to pay reparation awards. In addition, the Royal Fruit decision is ambiguous about whether Cali really was an officer, director or shareholder of Royal Fruit, for the ALJ found that Royal Fruit was the alter ego of Robert Heimann (App. 92-102), and that there was no evidence that Cali was a true shareholder or owner of Royal Fruit (App. 92-93). Thus, the findings in the Royal Fruit case raise more questions on this issue than they answer, which illustrates why Petitioner should have had an opportunity to confront them.

The court of appeals recognized the ambiguous nature of the facts in the Royal Fruit decision on the responsibly connected issue because it attempted to circumvent the denial of Petitioner's right to challenge or explain the Royal Fruit/Midland Banana findings at a hearing by noting that under Eighth Circuit precedent Cali was responsibly connected regardless of whether the company was the alter ego of Robert Heimann. (App. 5-6.) However, this argument fails to recognize that there was no evidence that Cali was responsibly connected in 1993. Furthermore, this argument misses the mark because the determination of whether Cali was responsibly connected in 1993 is for the ALJ in Petitioner's case to make in the first instance after a hearing at which all evidence has been presented so Petitioner has an opportunity to confront it. It is as likely that if confronted with all the evidence, the ALJ would have found that Cali was not responsibly connected under *Quinn v. Butz*, 510 F.2d, 743 (D.C. Cir. 1975), as it is that the ALJ would have found that Cali was responsibly connected under Eighth Circuit precedent. (See the ALJ decision in the Royal Fruit/Midland Banana cases in which the *Quinn* case is cited as authority to find that Robert Heimann was the alter ego of Royal Fruit. (App. 100.) In addition, PACA's responsibly connected provision, 7 U.S.C. § 499a(b)(9), was amended on November 15, 1995, to incorporate the *Quinn* standard that a person who is an officer, director or shareholder of a company which was the alter ego of another is not responsibly connected. Section 12(a) of the Perishable Agricultural Commodities Act Amendments of 1995, P.L. 104-48, 109 Stat. 424.) The point is that the agency must make this decision after a hearing,

and to say that such a hearing would make no difference under Eighth Circuit law improperly removes the decision – making authority from the agency and denies Petitioner's right to a meaningful hearing.

Finally, the court of appeals approved the way in which these documents were admitted into the record as an acceptable act of judicial notice, citing *Hart v. Comm'r*, 730 F.2d 1206, 1207, n.4 (8th Cir. 1984), and *United States v. Jackson*, 640 F.2d 614, 617 (8th Cir. 1981). (App. 5.) But these cases involve noticing another judicial proceeding to which the defendant was a party. In *Hart*, the appellate court judicially noticed a state criminal contempt proceeding, referred to by a taxpayer to excuse his nonappearance at a Tax Court hearing, to determine if the nonappearance was legitimate. In *Jackson*, the court approved taking judicial notice of a transcript from a prior hearing at which the defendant testified and which formed the basis of a perjury charge against the defendant. These examples of judicial notice are a far cry from what was approved here. What was approved here is akin to a federal district judge in a criminal case taking judicial notice, after a bench trial, of the entire opinion of another federal judge in a civil case in which the defendant was not a party, and selectively relying on facts from that opinion to convict and sentence the defendant without notice to the defendant. Such a procedure clearly exceeds the bounds of judicial notice.

The manner in which these documents were allowed into the record and used by the agency and the court of appeals subverts the doctrines of official notice and judicial notice in a way that violates fundamental fairness

required by the Due Process Clause of the Fifth Amendment and the APA. The admission into the record and the use of these documents directly conflicts with applicable decisions of this Court and the APA, and is a great departure from the normal course of judicial proceedings.

CONCLUSION

For the reasons stated, Petitioner, John J. Conforti, prays that this Court grant a Writ of Certiorari to review the decision of the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 95-1735

John J. Conforti, doing business as C & C Produce,	*	
Petitioner,	*	Appeal from the United States Department of Agriculture.
v.	*	
United States of America,	*	
Respondent.	*	

Submitted: September 11, 1995

Filed: January 18, 1996

Before WOLLMAN, LOKEN, and MORRIS SHEPPARD ARNOLD, Circuit Judges.

MORRIS SHEPPARD ARNOLD, Circuit Judge.

John Conforti appeals the Secretary of Agriculture's decision sanctioning him for violating the employment restrictions in the Perishable Agricultural Commodities Act of 1930, 7 U.S.C. § 499h(b) (1980) ("PACA"). We uphold the Secretary's determination that Conforti violated PACA, but modify the penalty that the Secretary imposed.

I.

PACA was enacted to protect produce growers "from the 'sharp practices of financially irresponsible and unscrupulous brokers in perishable commodities.' " *In re Lombardo Fruit & Produce Co.*, 12 F.3d 110, 112 (8th Cir. 1993) (quoting *Hull Co. v. Hauser's Foods, Inc.*, 924 F.2d 777, 780 (8th Cir. 1991). PACA requires wholesale produce dealers to obtain a license from the United States Department of Agriculture ("USDA"), 7 U.S.C. § 499c(a), and prohibits licensees from employing individuals "responsibly connected" to a company that has failed to satisfy USDA reparation orders. *Id.* § 499h(b)(3). Under the statute, a person is responsibly connected to a company if he serves as a partner, officer, or director of it, or if he holds more than 10 percent of its outstanding stock. *Id.* § 499a(9).

Conforti operates C&C Produce, a licensed produce dealership. In June, 1993, Conforti hired Joseph Cali, his life-long friend, to work for C&C Produce. On June 24, 1993, Conforti received a letter from the USDA informing him that Cali was responsibly connected to Royal Fruit, a company with several outstanding reparation orders. The letter indicated that Conforti could not employ Cali after July 24, 1993, unless he posted a bond that was later set at $100,000.

Conforti then tried to obtain a bond. He first asked his insurance company for one, but it required full collateralization. He next applied for a line of credit at United Missouri Bank ("UMB") to collateralize the bond, but learned that approval would take three months. Conforti

then decided to post $100,000 of his own funds to guarantee the line of credit. UMB initially approved the transaction, but changed its mind after the USDA advised the loan officer that Conforti's license was going to be revoked. In November, Conforti secured a line of credit at a different bank, but when he learned that the insurance company charged an additional $15,000 fee to issue the bond, he "threw up his hands" and abandoned his efforts.

Conforti did not fire Cali on July 24 as instructed; he did not finally fire him until November 19, 1993, after he gave up his search for a bond. In the interim, the USDA warned Conforti at least five times that Cali's continued employment could result in the suspension or revocation of his PACA license.

Three months after he fired Cali, the USDA filed a complaint seeking to revoke Conforti's PACA license. The Administrative Law Judge ("ALJ") found that Conforti had violated PACA and suspended his license for thirty days. The USDA appealed to the Judicial Officer ("JO"), who affirmed the ALJ's decision that Conforti violated PACA but increased the suspension to 90 days. The JO's decision is the final decision of the Secretary of Agriculture. 7 C.F.R. § 2.35 (1993). Conforti petitioned this court to review the Secretary's order pursuant to 28 U.S.C. § 2342.

II.

Conforti first argues that the JO improperly found that Cali was responsibly connected to Royal Fruit. He contends first that the finding cannot stand in the absence

of a predicate finding in a special hearing on the question of Cali's connection to Royal Fruit. We disagree. It is true that USDA regulations establish a procedure to challenge the USDA's "responsibly connected" designation. 7 C.F.R. §§ 47.48-47.63 (1993). This proceeding, however, commences after the USDA finds that a person is responsibly connected, *id.* § 47.49(a), and nothing in the statute indicates that PACA's employment restrictions take effect only after this proceeding is completed. The statute straightforwardly prohibits employing anyone who is a responsibly connected person as defined by PACA. 7 U.S.C. § 499h(b). Thus, if the record contains evidence that Cali was a partner, director, or officer in Royal Fruit, or held more than 10 percent of Royal Fruit's stock, his employment is restricted and Conforti violated PACA by employing him. *Id.* § 499a(9).

Conforti also maintains that even if a previous hearing under 7 C.F.R. §§ 47.48-47.63 was not required, the record lacks evidence indicating that Cali met PACA's definition of a responsibly connected individual. This argument is without merit. Prior to issuing his final order, the JO took official notice of an ALJ's opinion in *In re Midland Banana and Tomato Co.*, PACA Docket No. D-93-548, and *In re Royal Fruit*, PACA Docket No. D-93-549 (USDA 1994) ("*Royal Fruit*"). In *Royal Fruit*, the ALJ found that Cali was the President and a director of Royal Fruit and that he held 50 percent of the company's stock. Given these previous findings, we believe that the JO was justified in concluding that Cali was responsibly connected.

Conforti contends that the JO was not entitled to consider these previous findings because he improperly

used the device of official notice. We find no error in the JO's procedure. USDA regulations allow the JO to take official notice of "such matters as are judicially noticed by the courts of the United States," 7 C.F.R. § 1.141(g)(6) (1993), and the USDA Rules of Practice permit the JO to consider "any matter of which official notice is taken." 7 C.F.R. 1.145(i) (1993). We have held that "federal courts may *sua sponte* take judicial notice of proceedings in other courts if they relate directly to the matters at issue." *Hart v. Comm'r*, 730 F.2d 1206, 1207 n.4 (8th Cir. 1984); *see also United States v. Jackson*, 640 F.2d 614, 617 (1981). The JO also gave Conforti the required opportunity to object to the order taking official notice. 5 U.S.C. § 556(e).

Alternatively, Conforti contends that Cali is not responsibly connected because he played only a minor role in Royal Fruit. Conforti points to the ALJ's findings in *Royal Fruit* that Cali was by-and-large a "front man" and that Royal Fruit was actually the "alter ego" of Robert Heimann. Conforti argues that, under the doctrine adopted in *Quinn v. Butz*, 510 F.2d 743, 756 (D.C. Cir. 1975), Cali's nominal status in Royal Fruit merely raises a rebuttable presumption that he is responsibly connected.

The central difficulty that Conforti's argument encounters is that we specifically rejected it ten years ago. *See Pupillo v. United States*, 755 F.2d 638, 643 (8th Cir. 1985). We apply a *per se* rule: "Section 499a(9) [is] an irrebuttable statement that an officer, director, or holder of more than ten percent of the outstanding stock of a corporation is responsibly connected with that corporation or association." *Id.* Cali's actual responsibilities or interests in Royal Fruit are, therefore, irrelevant to the question of whether he was responsibly connected;

because he was both an officer in the company and held 33 percent of its stock, he was responsibly connected as a matter of law.

Because we find that the JO's decision that Cali was a responsibly connected person is supported by substantial evidence, we affirm it. *Pupillo*, 755 F.2d at 643.

III.

Conforti also asserts that he did not violate PACA because he made a good faith effort to obtain a bond and because the USDA led him to believe that he could continue to employ Cali while he was searching for a bond. We see how Conforti could have gotten this impression from his communications with the USDA. Although the USDA initially told Conforti to obtain a bond or fire Cali by July 24, the USDA did not set the bond amount until July 16, leaving very little time before the deadline. Conforti then asked the USDA to reduce the bond; the USDA denied his request on August 9. The August 9 letter reiterated that Conforti needed either to obtain a bond or fire Cali, but it did not mention the July 24 deadline. On July 30, the USDA sent a letter asking Conforti whether he intended to fire Cali or to obtain a bond. Finally in November, after Conforti stopped looking for a bond, M.A. Clancy, the PACA Licensing Program Review Head, advised him that if he could not post a bond, he should fire Cali.

Conforti does not cite any authority to support his official estoppel argument, and we know of none. In point of fact, the Supreme Court has repeatedly indicated that an estoppel will rarely work against the government.

See, e.g., Office of Personnel Management v. Richmond, 496 U.S. 414, 423 (1990). As the Court has noted, "When the government is unable to enforce the law because the conduct of its agents has given rise to an estoppel, the interests of the citizenry as a whole in obedience to the rule of law is undermined." *Heckler v. Community Health Services*, 467 U.S. 51, 61 (1984). Therefore, in the absence of "affirmative misconduct" by the government, *INS v. Hibi*, 414 U.S. 5, 8 (1973), "not even the temptations of a hard case" like Conforti's justify applying an estoppel against the USDA. *Federal Crop Ins. Co. v. Merrill*, 332 U.S. 380, 386 (1947).

We strictly construe PACA's employment restriction, *see Hull Co. v. Hauser's Foods*, 924 F.2d 777, 782 (8th Cir. 1991); *Pupillo*, 755 F.2d at 643, and, as the D.C. Circuit has noted, the "employment bar is phrased as an absolute." *Siegel v. Lyng*, 851 F.2d 412, 415 (D.C. Cir. 1988); 7 U.S.C. § 499h(b) ("The Secretary may . . . suspend or revoke the license of any licensee who, after the date given in such notice, continues to employ any person in violation of this section."). Therefore, Conforti's good faith efforts, however sincere, cannot excuse his failure to fire Cali.

IV.

After the Secretary determines that a licensee violated PACA's employment restrictions, he may suspend or revoke the license. 7 U.S.C. § 499h. Conforti argues that suspending his license for 90 days was unduly harsh. We review the Secretary's sanction for an abuse of discretion, affirming it unless it is "without justification in fact." *ABL Produce v. U.S.D.A.*, 25 F.3d 641, 645 (8th Cir.

1994). Even under this deferential standard, we agree that a 90-day suspension was not justified by the facts. We therefore reverse the JO's sanction and reinstate the ALJ's 30-day license suspension.

In *ABL Produce*, 25 F.3d at 645, a license-holder challenged an order revoking his license for violating PACA's employment restrictions. We reversed the sanction and reinstated the 30-day suspension awarded by the ALJ because the JO failed to consider several "relevant factors," namely, whether the company's conduct threatens to undermine PACA's purposes, the circumstances of the violation, and the effect the sanction will have on the company. *Id.* at 646. We apply these considerations to the case at hand.

A.

The JO found that by employing Cali, Conforti threatened to undermine PACA's purposes. As we have already noted, PACA was designed to protect produce growers from "sharp" and "unscrupulous" practices of financially irresponsible brokers. *In re Lombardo Fruit & Produce Co.*, 12 F.3d at 112. Congress was particularly concerned about the risk of non-payment. *ABL Produce*, 25 F.3d at 646.

The record in this case is devoid of evidence that Conforti is in any way a threat to produce growers. C&C Produce is financially healthy, and Conforti's suppliers themselves characterized his payment practices and ethics as "exemplary." The JO disregarded this information, however, concluding that "Mr. Conforti's ethics, payment practices, complaints against C&C produce and

the financial health of Mr. Conforti's company are irrelevant." Given the fact that PACA was intended to protect suppliers, we do not see how this kind of information can be characterized as irrelevant. The JO therefore erred when he refused to consider it.

The JO further found that employing Cali threatened the industry because he was responsibly connected to Royal Fruit. As we have already said, however, Cali was simply a "front-man" who lacked both authority and an actual interest in Royal Fruit. The ALJ considered Cali's "front man" status and concluded that "to say that Mr. Cali was a great risk to the industry is hyperbole." The JO, on the other hand, disregarded Cali's limited involvement because it "did not lessen the responsibility of Mr. Cali for Royal's PACA violations."

We agree entirely, as we said above, that the extent of Cali's participation has no bearing on whether he is responsibly connected to Royal Fruit. *Pupillo*, 755 F.2d at 643. We believe, however, that his actual position at Royal Fruit is relevant to whether Cali's employment at C&C Produce threatened the produce industry. By disregarding the fact that Cali's role in Royal Fruit was *de minimis*, therefore, the JO overstated the threat that Cali's employment posed to the produce industry.

B.

The JO also increased the ALJ's sanction because Conforti "deliberately chose not to heed [the government's] warning" to fire Cali or obtain a bond. We agree that Conforti should be punished for employing Cali for

four months after the USDA's deadline. We find, however, that the JO abused his discretion by not considering the mitigating circumstances in the case.

As the ALJ noted, Conforti "made a diligent and good faith effort to comply with the complainant's demands that he obtain a bond." During the period that Conforti employed Cali, he tried to obtain a bond from several different sources, and he consistently updated the USDA about his progress. While, as we have said, we do not agree with Conforti that his diligence absolves him of guilt in the matter, we do think that, particularly in light of the mixed signals sent by the USDA, all of which we rehearsed above, the JO erred by completely discounting his efforts.

C.

Finally, we think that the JO abused his discretion when he failed to consider how the 90-day suspension would affect C&C Produce. Conforti operates a wholesale produce dealership. Because his customers, primarily restaurants, require daily service, even a 30-day suspension is likely to have devastating financial consequences. *ABL Produce*, 25 F.3d at 647; *see also Capital Produce Co. v. U.S.*, 930 F.2d 1077, 1081 (5th Cir. 1991) ("The 45-day suspension may destroy or seriously hamper [the produce company's] relationships with its customers, who depend upon daily services"). We think that there is every chance that suspending his license for 90 days will drive Conforti, a man with a previously spotless record, out of the produce business altogether.

V.

For the reasons adduced, we affirm the decision of the Secretary of Agriculture finding that Conforti violated PACA's employment restrictions. We find, however, that the facts in the case do not justify the sanction imposed. In light of Conforti's exemplary record, his diligent efforts to obtain a bond, and Cali's limited participation in Royal Fruit, we reverse the JO's sanction and reinstate the ALJ's decision suspending Conforti's PACA license for 30 days.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:	)	PACA Docket No.
John J. Conforti, d/b/a C & C Produce,	)	D-94-524
	)	
	)	**Decision and**
Respondent	)	**Order**

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (PACA) (7 U.S.C. § 499a *et seq.*),[1] in which Administrative Law Judge James W. Hunt (ALJ) filed an Initial Decision and Order on July 28, 1994, suspending Respondent John J. Conforti's license for 30 days for permitting Joseph S. Cali to continue Mr. Cali's affiliation with him after being notified that Mr. Cali was ineligible to be employed by or affiliated with any PACA licensee without a surety bond and USDA approval, because Mr. Cali was responsibly connected with a PACA licensee (Royal Fruit Co., Inc.) which failed to pay reparation orders.

On August 23, 1994, Complainant, seeking a 90-day suspension order, appealed to the Judicial Officer, to whom final administrative authority to decide the Department's cases subject to 5 U.S.C. §§ 556 and 557 has been delegated (7 C.F.R. § 2.35).[2] On September 27, 1994,

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[1] *See generally* Campbell, *The Perishable Agricultural Commodities Act Regulatory Program*, in 1 Davidson, Agricultural Law, ch. 4 (1981 and 1989 Cum. Supp.), and Becker and Whitten, *Perishable Agricultural Commodities Act*, in 10 Harl, Agricultural Law, ch. 72 (1980).

[2] The position of Judicial Officer was established pursuant

Respondent Conforti filed a "Reply to Complainant's Appeal Petition and Respondent's Cross-Appeal Petition." On October 7, 1994, Complainant replied to Respondent's Cross-Appeal. The case was referred to the Judicial Officer for decision on October 11, 1994.

Based upon a careful consideration of the entire record in this case, the Initial Decision is affirmed and adopted as the Final Decision, with deletions shown by dots, changes or additions shown in brackets, and trivial editorial changes not specified. The sanction is increased to 90 days' suspension. Additional conclusions by the Judicial Officer follow the ALJ's conclusions.

ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION (AS MODIFIED)

This is a disciplinary proceeding brought pursuant to the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*) (the "PACA"), the Regulations promulgated pursuant to the PACA (7 C.F.R.

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to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g), Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), *reprinted in* 5 U.S.C. app. at 1280 (1988), and section 212(a)(1) of the Department of Agriculture Reorganization Act of 1994 (Pub. L. No. 103-354, § 212(a)(1), 108 stat. 3178, 3210 (1994)). The Department's present Judicial Officer was appointed in January 1971, having been involved with the Department's regulatory programs since 1949 (including 3 years' trial litigation; 10 years' appellate litigation relating to appeals from the decisions of the prior Judicial Officer; and 8 years as administrator of the Packers and Stockyards Act regulatory program).

§§ 46.1 through 46.45), and the Rules of Practice governing formal adjudicatory administrative proceedings (7 C.F.R. §§ 1.130 through 1.151).

The proceeding was instituted by a Notice to Show Cause and Complaint filed on February 4, 1994, by the Deputy Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture ("USDA" or "Department"). The Notice to Show Cause ordered C & C Produce, Inc., to show cause why its PACA license application should not be denied. However, prior to the hearing, C & C Produce, Inc., withdrew its license application and complainant withdrew its Notice to Show Cause. The Notice to Show Cause is therefore no longer a part of this proceeding.

The complaint alleges that respondent John J. Conforti, d/b/a C & C Produce, wilfully and flagrantly violated section 8(b) of the PACA (7 U.S.C. § 499h(b)) when he employed Joseph S. Cali from June 24, 1993, through December 1993, without posting a surety bond required by complainant.

A hearing was held on April 26, 1994, in Kansas City, Missouri. Complainant was represented by Andrew Y. Stanton, Esq. Respondent was represented by Stephen P. McCarron, Esq., Washington, D.C.

Facts

Respondent John Conforti, a PACA licensed dealer selling produce, both wholesale and retail, had hired Joseph Cali in June 1993. Cali until 1992 had been the president and holder of 33.3 percent of the stock of Royal

Fruit Co., Inc., which had also been a licensed PACA produce dealer. (RX-1.) According to documents presented at the hearing, Royal Fruit's coolers failed in May 1992 and the company had to shut down. As a result, it was unable to pay some of its produce suppliers, which resulted in reparation awards being issued against Royal Fruit. (CX 2, p. 10.) As of the date of the hearing in this case on April 26, 1994, Royal Fruit still owed approximately $92,000 to its suppliers. A disciplinary action against Royal Fruit was also instituted to revoke its PACA license. An initial decision was filed on July 26, 1994, finding that Royal Fruit had committed willful and flagrant violations of the Act (7 U.S.C. § 499b(4)) because of its failure to promptly pay its produce suppliers. *Midland Banana & Tomato Co., Inc., et al. and Royal Fruit Co., Inc., et al. . . .* (July 26, 1994) (PACA Docket Nos. D-93-548 and D-93-549)[, appeal pending before the Judicial Officer]. After Royal Fruit ceased operations, Cali took a job with a company called Liberty Fruit.

Cali and John Conforti, the respondent in this case, were lifelong friends, and Cali's wife had worked for Conforti on a part-time basis for 9 years. In June 1993, Conforti hired Cali to do dock sales for his company and do "anything else" Conforti asked him to do. (Tr. 130-131.) On June 24, 1993, Conforti received a letter from complainant in which he was told that complainant had determined that Cali was "responsibly connected" with Royal Fruit because of being an officer and owner of more than 10 percent of the stock in that company. Conforti was advised that under section 8(b) of the PACA he could not employ Cali without obtaining a surety bond and obtaining complainant's approval to employ Cali.

Unless he complied with these requirements within 30 days, he was told his license could be suspended or revoked. (CX 1, p. 1; CX 4, pp 1-2.)

Conforti testified that after he received the letter he had "every intention to get a bond." He contacted Cali's attorney who told him that he was contesting the charges against Cali, that an insurance settlement was pending, and that all the reparation awards against Royal Fruit would be paid. The lawyer said he would write a letter to complainant. Both the lawyer and Conforti wrote letters. In his letter, Conforti provided the information complainant had requested concerning Cali's employment with Conforti. He said that Cali was a receiver and quality control supervisor who handled dock sales and that he worked under Conforti's supervision at all times. (Tr. 132-133, 168; CX 4, pp. 3, 6.)

Complainant responded on July 16 with a letter informing Conforti that a bond of $100,000 had to be obtained from a complainant-approved bonding company and that the bond could not be canceled for 4 years and 9 months. The letter further informed Conforti that complainant might pursue disciplinary action against Cali which could result in Cali being barred from employment by Conforti or any other PACA licensee for 1 year regardless of whether there was a bond or not. (CX 4, p. 7.)

Conforti then contacted his insurance agent about obtaining a bond. The agent told him there would be "no problem" in getting a bond and that the bond would cost 3 percent a year. However, when the agent tried to obtain a bond, he found that Conforti would have to put up the

$100,000. Conforti said he did not have that much money and wrote to complainant asking that the bond be reduced. Complainant refused. (Tr. 137-138; CX 4, p. 10.)

Conforti then went to his bank to try to secure a line of credit for the bond. The bank said that he could probably receive a loan on his accounts receivable to cover his line of credit, but in October told him it would take 3 months to make the loan. Conforti, who on September 30 had received a letter from complainant asking for the bond and reminding him that his affiliation with Cali without a bond could result in his license being suspended or revoked, told the bank that he could not wait 3 months for a loan. The bank responded that he would have to put up the $100,000 to get the loan to cover his line of credit. Conforti proposed that he put up $60,000 and his company $40,000. The bank, however, this time replied that .. was "advised" not to make the loan because Cali's license was to be revoked and that the bond would then be "no good." (Tr. 139-146; CX 4, p. 11.)

Conforti tried a different bank which told him that he could receive the line of credit if he deposited $100,000. Conforti agreed to put up the $100,000, but then learned from the bonding company that the bond had to be for at least 5 years and that this would cost him another $15,000 to pay the bonding company the interest it demanded for a 5-year bond. (Tr. 147-149.)

At about this same time Conforti received another letter from complainant, on November 10, telling him that because it had not received the bond, it was referring the matter to an investigator concerning his affiliation with Cali. At this point, Conforti said, "I just basically

threw my hands up. . . . It just was too much. I couldn't do no more." (Tr. 149-150; CX 4, p. 12.)

Conforti called complainant to tell him that he was going to terminate Cali. On November 19, Conforti fired Cali, which, he said, "was probably the hardest decision that I had ever made in my life, terminating – you know, a life long friend. But I had no choice. It was our friendship or my company." (Tr. 149-152.)

Three months later the instant complaint was filed against Conforti alleging that he had violated section [8](b) of the PACA by employing Cali without obtaining a bond.

Law

Section 1(9) of the Act (7 U.S.C. § 499a(9)) provides:

> The term "responsibly connected" means affiliated or connected with a commission merchant, dealer, or broker as . . . (B) officer, director, or holder of more than 10 per centum of the outstanding stock of a corporation or association.

[Section 1(10) of the Act (7 U.S.C. § 499a(10)) provides:

> (10) The terms "employ" and "employment" mean any affiliation of any person with the business operations of a licensee, with or without compensation, including ownership or self-employment.]

Section 8(b) of the PACA (7 U.S.C. 499h(b)) provides in part:

(b) Except with the approval of the Secretary, no licensee shall employ any person, or any person who is or has been responsibly connected with any person –

. . . .

(3) against whom there is an unpaid reparation award issued within two years, subject to his right of appeal under section 499g(c) of this title.

The Secretary may approve such employment at any time following nonpayment of a reparation award . . . if the licensee furnishes and maintains a surety bond in form and amount satisfactory to the Secretary as assurance that such licensee's business will be conducted in accordance with this chapter and that the licensee will pay all reparation awards, subject to its right of appeal under section 499g(c) of this title, which may be issued against it in connection with transactions occurring within four years following the approval. . . . The Secretary, based on changes in the nature and volume of business conducted by the licensee, may require an increase or authorize a reduction in the amount of the bond. A licensee who is notified by the Secretary to provide a bond in an increased amount shall do so within a reasonable time to be specified by the Secretary, and if the licensee fails to do so the approval of employment shall automatically terminate. The Secretary may, after thirty days notice and an opportunity for a hearing, suspend or revoke the license of any licensee who, after the date given in such notice,

continues to employ any person in violation of this section.[3]

Discussion

Complainant contends that Conforti violated section 8(b) of the Act when he continued to employ Cali 30 days after receiving complainant's letter on June 24, 1993, warning him that he could not employ Cali without a bond. Complainant contends that the appropriate sanction for this violation is revocation of Conforti's PACA license.

Respondent Conforti contends that complainant has failed to prove a violation by a preponderance of the evidence and that the complaint should therefore be dismissed. Respondent argues a) that it was not shown that Cali was responsibly connected with Royal Fruit; b) that respondent was not given a reasonable period of time to obtain a bond; and c) that he was denied due process.

Respondent's challenge to the determination of Cali's responsibly connected status is a collateral attack on a determination made in another proceeding. However, rather than enter into an extended discussion of whether he can raise the issue in this, a related proceeding, the argument will be disposed of with the following findings. Complainant has presented evidence showing that Cali was responsibly connected with Royal Fruit. It made this determination, as the Act required, on the basis that Cali was an official in the company and that he owned more

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[3] [This paragraph quotes slightly more of section 8(b) of the Act than the ALJ quoted.]

than 10 percent of the company's stock. With this evidence in the record, the burden shifted to respondent to show any irregularities in this determination. Respondent, however, failed to present such evidence. Complainant's determination of Cali's status is thus presumed to have been made properly.

In support of his second argument, that he was not given a reasonable period of time to obtain a bond, respondent refers to the reasonable period to obtain a bond that the Act provides for a person already having a bond. That statutory provision, however, does not apply to obtaining an initial bond. I find no basis for inferring in the Act's silence on this point that there is an implied extended period to obtain an initial bond beyond the statutory 30-day period.

Respondent also argues that the bonding procedure is unfair and confusing with no regulations on the matter. The Act, however, is as clear as any regulation could be that after a 30-day notice complainant may suspend or revoke a person's license. As for whether the bond was unfair, it could be argued that the amount of a bond could be so excessive as to be unreasonable, but it is not shown in this case that the amount of bond set by complainant, while almost too steep for respondent to obtain, was unfair or unreasonable.

Respondent further argues that complainant's letters to respondent imply that his license would not be suspended or revoked as long as he actively sought a bond. The letters, however, contain no such implication; they are explicit that any time after the initial 30-day notice action could be taken if respondent continued to employ

Cali without having a bond. It was within complainant's discretion to decide when to institute such action and the failure to institute action promptly at the end of the 30-day period did not constitute any form of estoppel to action by complainant at a later date.

As for respondent's contention that [he] was denied due process, this argument will be covered under the discussion of complainant's proposed sanction.

I find, on the basis of the record made at that hearing, that complainant has shown by a preponderance of the evidence that when respondent hired Cali he employed a person who was "responsibly connected" with a firm against whom there were imposed reparation awards, that respondent was given proper notice of that fact by complainant, that complainant gave respondent a clear and adequate 30-day notice that he had to obtain a bond to continue employing Cali, that respondent was given notice that after this 30-day period action could be taken to suspend or terminate his license, and that respondent continued to employ Cali at the conclusion of this 30-day period. I accordingly find that respondent violated section 8(b) of the Act.

Complainant contends that the appropriate sanction for respondent's violation is revocation of his license, which is the ultimate civil penalty possible [4]

. . . .

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[4] [On appeal, Complainant herein has reduced its recommended sanction from license revocation to a 90-day suspension. I agree with the ALJ (and Complainant) that a suspension is appropriate, rather than revocation.]

Nevertheless, great weight is supposed to be accorded to complainant's penalty recommendations. *S.S. Farms Linn County, Inc., et al.*, 50 Agric. Dec. 476, 497 (1991)[, *aff'd*, 991 F.2d 803 (9th Cir. 1993) (Table) (text in WESTLAW) (not to be cited as precedent under 9th Circuit Rule 36-3)]. . . .

The basis for complainant's recommendation is that the purpose of the PACA is to protect farmers and growers from the sharp practices of irresponsible persons in the produce industry and to exclude all but financially responsible persons from businesses subject to the PACA. *Midland Banana & Tomato Co., Inc., supra*, at 14. Complainant believes that Cali was such an irresponsible person because of his "history" of being unable or unwilling to comply with the Act. (Tr. 47.) . . .

. . . .

Complainant opines that Conforti put the industry at "great risk" by hiring Cali before obtaining a bond. (Tr. 47.) Conforti, however, has had no complaints filed against him and his company is a financially healthy and solvent business. (RX 1, 3.) Respondent, moreover, presented testimony from his suppliers who said that his payment practices and ethics were "exemplary." (Tr. 104, 111.) There was certainly some risk involved in hiring Cali, and a bond would have minimized the risk. . . .

Finally, complainant contends that revocation of respondent's license is necessary as a deterrent to show the industry that it is serious in dealing with persons who circumvent its sanctions. (Tr. 81.) . . .

Considering all the circumstances, I find complainant has failed in its burden of showing that revoking respondent's license is reasonable or necessary. Rather, I find that a [90-day[[5]] suspension of respondent's license is sufficiently severe as a penalty for respondent's violation and as a warning to others.

Findings of Fact

1. Respondent John J. Conforti, d/b/a C & C Produce, is an individual whose business address is 401 Main Street, Kansas City, Missouri 64105. (CX 3.)

2. Pursuant to the licensing provisions of the PACA, license number 920731 was issued to respondent on February 24, 1992. This license has been renewed annually, is presently in effect, and is next subject to renewal on February 24, 1995. (CX 3; complainant's brief, p. 4.)

3. Royal Fruit Co., Inc., was a licensed PACA dealer whose license was terminated on December 1, 1992, due to its failure to pay the required annual license fee. (RX 1.) Between February 1993 and December 1993, nine reparation orders were issued against Royal Fruit totalling $110,272.60, which it has failed to pay. (CX 2.)

4. Joseph S. Cali was the president and 33.3 percent stockholder of Royal Fruit.

5. Joseph S. Cali was responsibly connected with Royal Fruit.

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[5] [Increased by the Judicial Officer from 30 days to 90 days, as recommended by Complainant.]

6. Joseph S. Cali was barred from employment subject to the PACA[, without the Secretary's approval, and the furnishing of a bond by the employer,] for 2 years from the date of the most recent unpaid reparation order.

7. Cali was employed by respondent in June 1993.

8. On June 24, 1993, respondent received a letter from complainant notifying him that Cali was barred from employment until respondent posted bond in an amount satisfactory to complainant and that respondent could not continue to employ Cali after 30 days from receipt of the letter.

9. On July 16, 1993, complainant sent respondent a letter notifying him that he would have to post a $100,000 bond before Cali could be employed.

10. Respondent made a diligent and good faith effort to obtain a bond in the amount demanded by complainant. He was unable to obtain a bond.

11. Respondent terminated Cali's employment on November 19, 1993.

Conclusion of Law

Respondent John J. Conforti, d/b/a C & C Produce, violated section 8(b) of the PACA (7 U.S.C. § 499h(b)).

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Both parties appealed the ALJ's Initial Decision. Complainant filed first, complaining that the 30-day suspension should be 90 days, and that the ALJ should have found Respondent's actions willful.

Respondent replied (1) that a willfulness finding is unnecessary to imposing the sanction because statutory prior notice was given under the APA; and (2) that any suspension period above the 30 days' assessed by the ALJ is excessive ("piling on").

Respondent's cross-appeal will be specifically addressed, *infra*, but its general thrust is that the record evidence does not support the ALJ's findings. However, I find that there is much more than a preponderance of the evidence supporting the Complaint, which is all that is required.[6]

The Respondent makes four arguments in the cross-appeal which are recycled virtually verbatim from Respondent's Brief filed with the ALJ (June 17, 1994):

1. The ALJ erred in finding that Complainant had proved that Cali was responsibly connected to Royal.

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[6] *See Herman & MacLean v. Huddleston*, 459 U.S. 375, 387-92 (1983); *Steadman v. SEC*, 450 U.S. 91, 92-104 (1981); *In re Albert Lee Rowland*, 40 Agric. Dec. 1934, 1941 n. 5 (1981), *aff'd*, 713 F.2d 179 (6th Cir. 1983); *In re Gold Bell-I&S Jersey Farms, Inc.*, 37 Agric. Dec. 1336, 1346 (1978), *aff'd*, No. 78-3134 (D.N.J. May 25, 1979), *aff'd mem.*, 614 F.2d 770 (3d Cir. 1980).

2. The Department's procedure for a licensee to obtain an employment bond violates the statute.

3. Respondent was denied due process because the Department failed to notify C&C clearly that it must terminate Cali while seeking a bond.

4. This enforcement proceeding denied Respondent due process and equal protection of the law.

Regarding the first, Respondent argues that Complainant failed to meet its burden of proof that Mr. Cali was responsibly connected with Royal Fruit, the company which was found in nonpayment of reparation awards, which nonpayment gave rise to Mr. Cali's employment restrictions. However, I find that there is much more than a preponderance of the evidence supporting the Complaint, which is all that is required.[7] The evidence is adequately summarized in the ALJ's Initial Decision (at 6-7), which I have adopted. I also agree with the more extensive discussion of the evidence set forth in Complainant's Response to Respondent's Appeal (at 2-4 (Oct. 7, 1994)), but no useful purpose would be served by further discussion of the evidence, in view of the adequate discussion by the ALJ.

However, there is another issue beyond the sufficiency of the evidence to show that Mr. Cali was subject to employment restrictions, because of the failure of Royal Fruit Company to pay reparation awards.

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[7] *Ibid.*

Although I agree with the ALJ's determination that Complainant's position is supported by the record as to this issue, *Respondent is not a proper party to raise this issue.* The Department has a procedure for determining whether a person is responsibly connected with a licensee under the PACA subject to employment restrictions because of the licensee's violations. 7 C.F.R. §§ 47.47-.68. *See, e.g., Pupillo v. United States,* 755 F.2d 638 (8th Cir. 1985). Mr. Cali could have contested Complainant's determination that he was under employment restrictions, but he did not. Respondent's attorney acknowledged in his opening statement to the ALJ that "Mr. Cali was determined to be somebody responsibly connected with Royal Fruit Company" (Tr. 15). If Mr. Cali had contested the Department's determination as to his employment restrictions on the ground that the reparation awards had been paid, that would have been an affirmative defense, which Mr. Cali would have had to prove. Respondent has no standing to collaterally attack Complainant's determination as to Mr. Cali's employment restrictions.

The Act defines the terms "responsibly connected," "employ," and "employment" as follows (7 U.S.C. § 499a(9), 10)):

> (9) The term "responsibly connected" means affiliated or connected with a commission merchant, dealer, or broker as (A) partner in a partnership, or (B) officer, director, or holder of more than 10 per centum of the outstanding stock of a corporation or association;
>
> (10) The terms "employ" and "employment" mean any affiliation of any person with the business operations of a licensee, with or

> without compensation, including ownership or self-employment.

It should be noted that the terms "employ" and "employment" mean "*any* affiliation . . . with the business operations of a licensee, with or without compensation" (7 U.S.C. § 499a(10) (emphasis added)). The terms "employ" and "employment" are not limited to a "responsibly connected" person, or to employment in an important or responsible position. "[A]ny" affiliation, even without compensation, meets the statutory definition. The word "any" is a broad and comprehensive term. *United States v. Rosenwasser*, 323 U.S. 360, 362-63 (1945); *FDIC v. Winton*, 131 F.2d 780, 782 (6th Cir. 1942); *Kuhlman v. W. & A. Fletcher Co.*, 20 F.2d 465, 468 (3d Cir. 1927).

In *ABL Produce, Inc. v. USDA*, 25 F.3d 641, 644 (8th Cir. 1994), the Court stated:

> The definition [of "employ" and "employment"] makes clear that the analysis is to focus on whether there was a relationship between Lombardo and ABL's business operations, and not necessarily whether there was an agency relationship between Lombardo and ABL. *Cf. Tri-County Wholesale Produce Co. v. Department of Agriculture*, 822 F.2d 162, 165 (D.C. Cir. 1987) (per curiam) ("[The Act on its face indicates that the statutory] term 'employment' is to be given a broad reading, indeed to include 'any affiliation' ").

The legislative history of the amendatory legislation adding the definition of "employ" and "employment" states (H.R. Rep. No. 1546, 87th Cong., 2d Sess. 4 (1962)):

> This section of the bill adds to the first section of the Perishable Agricultural Commodities Act definitions of "responsibility connected" and "employ" or "employment." These new definitions are necessary by reason of the rewriting of the provisions relating to sections 4(b), 4(c), and 8(b) of the act. These terms, although heretofore used in the act, were not defined. Their definition will give them specific meaning, thus avoiding possible confusion as to interpretations. The defining of "employ" and "employment" to include ownership or self-employment makes it clear that the provisions of section 8(b), as amended, apply to owners, as well as others employed in the business. To fail to include owners would defeat the whole purpose of this provision of the act. Heretofore the phrase used in connection with § 8(b) was "employ in a responsible position" and considerable difficulty has been encountered in delineating what constituted a responsible position.

The Perishable Agricultural Commodities Act, as originally enacted in 1930, contained no provisions restricting the employment of a person whose license was suspended or revoked, or who failed to pay a reparation award. The first employment restrictions were added by an amendment adding section 8(b), approved August 20, 1937, which prohibited the employment "in a responsible position" of a person whose license was revoked or who was responsibly connected with a firm whose license was revoked. After 1 year following the revocation, such employment was permissible if a satisfactory bond was filed. The 1937 amendment provided (50 Stat. 725, 730 (1937) (emphasis added)):

> (b) The Secretary may, after thirty days' notice and an opportunity for a hearing, revoke the license of any commission merchant, dealer, or broker who, after the date given in such notice, continues to employ *in any responsible position* any individual whose license was revoked or who was responsibly connected with any firm, partnership, association, or corporation whose license has been revoked. Employment of such individual by a licensee *in any responsible position* after one year following the revocation of any such license shall be conditioned upon the filing by the employing licensee of a bond, in such reasonable sum as may be fixed by the Secretary, or other assurance satisfactory to the Secretary that its business will be conducted in accordance with the provisions of this Act[.]

In 1956, the employment restriction was made applicable to a person whose license is suspended, or who was responsibly connected with a firm whose license is under suspension. The 1956 amendment to section 8(b) of the Act is as follows (70 Stat. 726, 727 (1956) (emphasis added)):

> (b) The Secretary may, after thirty days' notice and an opportunity for a hearing, suspend or revoke the license of any commission merchant, dealer, or broker who, after the date given in such notice, continues to employ *in any responsible position* any individual whose license has been revoked or is under suspension or who was responsibly connected with any firm, partnership, association, or corporation whose license has been revoked or is under suspension. Employment of an individual whose license has been revoked or is under suspension for failure

> to pay a reparation award or who was responsibly connected with any firm, partnership, association, or corporation whose license has been revoked or is under suspension for failure to pay a reparation award after one year following the revocation or suspension of any such license may be permitted by the Secretary upon the filing by the employing licensee of a bond, of such nature and amount as may be determined by the Secretary, or other assurance satisfactory to the Secretary that its business will be conducted in accordance with the provisions of this Act[.]

Since the Act had previously been amended in 1934 to provide for the automatic suspension of the license of a licensee who failed to pay a reparation award or file an appeal for judicial review (48 Stat. 584, 588 (1934); 7 U.S.C. § 499g(d)), the 1956 amendment made the Act more restrictive than the 1937 amendment, discussed above, as to the employment of a person who had not paid a reparation award.

The legislative history of the 1956 amendatory legislation states (S. REP. NO. 2507, 84th Cong., 2d Sess. 4 (1956) (emphasis added)):

> Section 8(b) would authorize the Secretary to suspend the license of a person who employs *in any responsible position* an individual whose license is under suspension. In effect, this would place restrictions on suspended licensees comparable to those now in effect for revocations, and it would serve to eliminate the effectiveness of dummy organizations and other such devices that might be set up to circumvent the suspension penalty.

In 1962, section 8(b) of the Act was amended to contain the provisions currently in effect, which are set forth above (76 Stat. 673, 675-76 (1962); 7 U.S.C. § 499h(b)). The 1962 amendment makes the Act much harsher, in one respect, with regard to the employment of a person who fails to pay a reparation award. Under the 1962 amendment, such a person cannot be employed in any capacity, without a bond, whereas the previous restrictions were applicable only to employment "in any responsible position." Moreover, at the same time that the employment restrictions were made harsher, in this respect, the definitions of "employ" and "employment," discussed above, were added, defining employment as "any affiliation of any person with the business operations of a licensee, with or without compensation, including ownership or self-employment" (7 U.S.C. § 499a(10)).[8]

The legislative history of the 1962 amendatory legislation, which enacted the provisions of section 8(b) currently in effect, states (H.R. REP. NO. 1546, 87th Cong., 2d Sess. 8 (1962) (emphasis added)):

> Section 11 amends section 8(b) of the act to clarify and make more effective the provisions of the act with respect to employment by licensees of persons who have been found to have violated the act or failed to pay reparation awards under the act, as well as persons responsibly connected with such persons. It prohibits the employment of these persons by a licensee

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[8] In another respect, the 1962 amendment relaxed the employment restrictions as to a person who failed to pay a reparation award since it eliminated the 1-year waiting period.

without the approval of the Secretary and prescribes standards with respect to the conditions for such approval, authorizing the approval of such employment upon the furnishing and maintaining of a surety bond satisfactory to the Secretary as assurance that the licensee's business will be conducted in conformance with the act and all reparation awards paid. Employment under such conditions may be approved, with respect to unpaid reparation awards, at any time and, with respect to persons found guilty of flagrant or repeated violations of the act, after 1 year, with authority in the Secretary to approve employment of the latter persons without a surety bond after the expiration of 2 years. It is further provided that the Secretary may increase the amount of bond required and that failure to comply with his order in that regard shall result in automatic termination of approval. Any licensee hiring a person without the approval of the Secretary in violation of this provision, after notice and opportunity for hearing, may have his license suspended or revoked. *At present the act applies only to the employment of a person in a responsible position. This has caused serious difficulties due to the problem of delineating what constitutes a responsible position under all circumstances and the difficulty of ascertaining the true nature of the employee's relationship with the licensee.* Under the present provisions of the act the restrictions against employment are directed specifically to persons whose licenses had been revoked or suspended and persons responsibly connected therewith. The bill extends such restrictions to persons whose licenses could have been revoked or suspended if they had had active

> licenses. As amended, section 8(b) would prohibit employment of persons covered by it unless such employment is approved by the Secretary; whereas at present it prohibits such employment only after notice by the Secretary.

The court in *Siegel v. Lyng*, 851 F.2d 412, 415-16 (D.C. Cir. 1988), recognized the expanded scope of the employment restriction by virtue of the 1962 amendments, as follows:

> Not only is section 499h(b)'s employment bar phrased as an absolute, but also the Act elsewhere defines employment as "*any affiliation* of any person with the business operations of a licensee, with or without compensation, including ownership or self-employment." 7 U.S.C. § 499a(10) (emphasis added). This Court in *Quinn* explicitly remarked that Congress had approved a " 'clear and equitable' rule that denied him [PACA violator] *any* employment, for the pertinent period, rather than require a new determination of precisely which positions were closed." 510 F.2d at 756 (emphasis added) (footnote omitted).
>
> Indeed, Congress amended the Act in 1963 precisely to clarify this comprehensive bar. Immediately prior to the 1962 amendments, the Secretary was authorized to sanction licensees only when these employers hired a violator (or responsibly connected person) for a "responsible position." Because this determination proved difficult to administer, the qualification was deleted altogether in 1962. Congress explained the deletion with statements that prove an intent to incorporate an expansive

employment bar. The House Committee on Agriculture, for example, stated:

> At present the act applies only to the employment of a person in a responsible position. This has caused serious difficulties due to the problem of delineating what constitutes a responsible position under all circumstances and the difficulty of ascertaining the true nature of the employee's relationship with the licensee.

H.R. REP. NO. 1546, 87th Cong., 2d Sess. 8 (1962).

From the foregoing, it is clear that Congress regarded a person whose license has been revoked or who fails to pay a reparation award as a tainted person who is likely to contaminate any licensee whose business operations he or she becomes affiliated with in any manner, with or without compensation. Congress prohibited any affiliation (with or without compensation) of such a tainted person with a licensee unless (i) the affiliation is approved by the Secretary, and (ii) the licensee furnishes a bond in form and amount satisfactory to the Secretary. The evidence here shows that Mr. Cali was affiliated with the business operations of Respondent, thereby constituting "employment," within the meaning of the Act.

Concerning Respondent's second argument, Respondent put the identical, verbatim argument in Respondent's Brief filed with the ALJ (Argument 2, at 7-10 (June 17, 1994)). I completely agree with the ALJ's Initial Decision at 7, which rejects the argument that USDA bonding procedures are unreasonable, unfair, confusing, and violated the statute (7 U.S.C. § 499h(b)). Respondent relies, in this respect, on the fact that the Act expressly states

that a licensee shall provide an *increased* bond "within a reasonable time to be specified by the Secretary" (7 U.S.C. § 499h(b)). But that is fatal to Respondent's position – not helpful. It is a well-settled principle of statutory construction that the inclusion of a provision in one part of a section, while omitting it in another part, emphasizes that the provision should not be implied in the place at which it is omitted. *See Lang v. Commissioner,* 289 U.S. 109, 112 (1933); *Corn Prods. Ref. Co. v. Benson,* 232 F.2d 554, 562 (2d Cir. 1956).

The Respondent's third argument is again a virtually verbatim rendition of Respondent's Brief filed with the ALJ (Argument 3, at 10-12). The ALJ rejected this argument, which is basically that the Complainant's notification and other letters to Respondent resulted in a deprivation of procedural due process. I agree with the ALJ (Initial Decision at 7-8). As stated by the ALJ, the Department's letters are "explicit that any time after the initial 30-day notice action could be taken if respondent continued to employ Cali without having a bond" (*Ibid.*). Complainant's first (and most important) warning letter, dated June 16, 1993, states (CX 4, pp. 1-2):

> We have received information you are currently employing Mr. Joseph S. Cali formerly of Royal Fruit Co., Inc., Kansas City, Missouri. Mr. Cali is currently restricted from employment by any licensee under the Perishable Agricultural Commodities Act (PACA) as a result of Royal Fruit Co., Inc.'s failure to pay several reparation awards issued against it under the Act.
>
> The Department's records show Mr. Cali was responsibly connected with Royal Fruit Co.,

Inc., as the president and stockholder during the period of the violations.

Section 8(b) of the PACA, copy enclosed, provides that when a reparation award is issued against a corporation and remains unpaid, no licensee shall employ the officers, directors, and holder of more than 10 percent of the stocks of the violator firm, nor can they be affiliated with any licensee in any capacity. The Secretary, however, may approve such employment provided that the employing licensee posts a surety bond and obtains USDA approval. The terms "employ" and "employment" are defined under the Act as any affiliation of any person with the business operations of a licensee, with or without compensation, including ownership or self-employment.

Before the Department will approve Mr. Cali's continued employment with your firm, it will be necessary for a surety bond to be posted in an amount satisfactory to the Secretary. In order to determine the amount of the bond to be posted, the following information should be furnished:

. . . .

Pursuant to Section 8(b) of the Act, notice is given that after 30 days from the receipt of this letter, Mr. Joseph S. Cali cannot continue his employment with your firm unless a surety bond is posted and USDA's approval obtained. To continue such employment after that date without posting the surety bond and obtaining the USDA's approval could result in the suspension or revocation of your firm's PACA license.

After Mr. Cali's attorney wrote to Complainant on June 28, 1993 (CX 4, p. 3), Complainant's reply dated July

9, 1993, refers to a warning telephone call to Respondent, as follows (CX 4, p. 5):

> Furthermore, this letter will confirm my July 7, 1993, telephone conversation with Mr. Conforti regarding the surety bond required as a prerequisite to his firm's continued employment of Mr. Cali. As I explained to Mr. Conforti, his affiliation of Mr. Cali is prohibited beyond 30 days from the receipt of our letter of June 16, 1993, unless Mr. Conforti's firm posts the required bond and obtains Department of Agriculture (USDA) approval.
>
> USDA records reflect that Mr. Conforti received our letter on June 24, 1993. Therefore, be advised that any affiliation of Joseph S. Cali with C & C Produce after July 24, 1993, could result in an administrative action seeking to suspend or revoke the firm's PACA license.

On July 12, 1993, Respondent wrote to Complainant, giving information needed to compute the bond amount, and stating (CX 4, p. 6):

> IN RESPONSE TO YOUR LETTER [i.e., the first warning letter,)] RECEIVED JUNE 18TH, 1993, ON JOSEPH S. CALI REGARDING HIS EMPLOYMENT, WE HAVE SHOWN MR. CALI THE LETTER AND INFORMED HIM OF HIS TERMINATION BEGINNING ON JULY 18TH, 1993, UNLESS A SURETY BOND IS OBTAINED.

On July 16, 1993, Complainant replied that a bond in the amount of $100,000 would be required (CX 4, pp. 7-8). On July 28, 1993, Respondent wrote to Complainant, arguing that a bond in the amount of $100,000 was "A LITTLE TOO HIGH" (CX 4, p. 9). But Respondent did not

advise Complainant that Mr. Cali had not been terminated, as Respondent had stated would happen on July 18, 1993, in his previous letter (*ibid.*).

On August 9, 1993, Complainant wrote to Respondent, stating (CX 4, p. 10):

> I am writing to acknowledge receipt of your request to reconsider the amount of surety bond necessary under Section 8(b) of the Perishable Agricultural Commodities Act (PACA) as a prerequisite to your firm's employment of Mr. Joseph S. Cali.
>
> . . . .
>
> We have reviewed your recent faxed letter, and found it provides no facts and raises no issues that we had not thoroughly considered when we established the $100,000 bond requirement. A reduction of that amount is therefore not warranted.
>
> We have enclosed a bond form and a list of approved surety companies for your use. If you intend to employ Joseph J. Cali, the bond must be submitted in the amount of $100,000 to cover a 4 year period from the date Mr. Cali's employment is approved, plus an additional 9 months to cover any complaints that may be filed.

Since Complainant received no reply to its August 9, 1993, letter, Complainant wrote Respondent a reminder on September 30, 1993, stating (CX 4, p. 11):

> We are writing in reference to our letter of August 9, 1993, copy enclosed, signed by Eric M. Forman, Deputy Director, Fruit and Vegetable Division, regarding the $100,000 surety bond required under Section 8(b) of the Perishable

> Agricultural Commodities Act (PACA) as a prerequisite to your firm's employment of Mr. Joseph S. Cali. We have yet to receive the bond or your written response and consider this matter to be of sufficient importance to warrant your prompt reply.
>
> You are reminded that any affiliation of Joseph S. Cali with your firm prior to obtaining the required bond and USDA approval could result in an administrative action to suspend or revoke your firm's PACA license.

Finally, on November 8, 1993, Complainant wrote Respondent its final letter, stating (CX 4, p. 12):

> We are writing in reference to our correspondence of August 9 and September 30, 1993, copies enclosed, regarding the $100,000 surety bond required under Section 8(b) of the Perishable Agricultural Commodities Act (PACA) as a prerequisite to your firm's employment of Mr. Joseph S. Cali.
>
> Since we have not received the $100,000 bond or your written reply to this matter, we have no alternative but to close our file on this matter and refer it to our Glen Ellyn, Illinois regional office for an investigation into your firm's possible affiliation of Mr. Cali beyond July 24, 1993.
>
> Again, be reminded that any affiliation of Mr. Cali with your firm after July 24, 1993, prior to posting the $100,000 bond and obtaining Department of Agriculture approval could result in an administrative action seeking to suspend or revoke your firm's PACA license.

Nothing in any of Complainant's letters lends any support to Respondent's argument that there was a lack

of clarity in the letters. Here, as in *In re ABL Produce, Inc.*, 52 Agric. Dec. 1578, 1589-92 (1993), *aff'd in part & rev'd in part*, 25 F.3d 641 (8th Cir. 1994), Respondent's disagreements with Complainant's view of the case, expressed in Respondent's letters, do not aid Respondent here. As stated in *In re ABL Produce, Inc., supra*, 52 Agric. Dec. at 1592:

> Respondent cannot enlarge the notice requirements of the PACA (7 U.S.C. § 499h(b)) and the Administrative Procedure Act (5 U.S.C. § 558(c)) merely by denying (erroneously) that Lombardo was employed by or affiliated with Respondent, and seeking further opportunity to respond, before the filing of a Complaint. The June 26, 1991, notice advised Respondent of the exact conduct alleged in the present case, and afforded Respondent an opportunity to correct the conduct. That notice was not rendered sterile by Middendorf's erroneous denial as to Lombardo's affiliation with ABL, and Middendorf's request to be notified immediately if he would not be given further notice and a further opportunity to respond before any adverse action is brought.

With respect to Respondent's estoppel argument – which is essentially that Complainant's letters imply that Respondent's license was to be held harmless for so long as a bond was actively sought – I agree with the ALJ (Initial Decision at 7-8) that the facts here present no case for estoppel. There is no such implication in Complainant's letters. Respondent has shown no Government actions, statements or acquiescence, upon which Respondent relied to its detriment. Consequently, Respondent

has "failed to prove either negligence or affirmative misconduct by the United States Department of Agriculture and, as a result, the doctrine of estoppel cannot be applied" (*In re DiCarlo Distributors, Inc.*, 53 Agric. Dec. ___, slip op. at 24, 40 (Nov. 7, 1994), *appeal docketed*, No. 94-4218 (2d Cir. Nov. 21, 1994)).

Moreover, my view that the Government is not subject to estoppel when it is acting in its sovereign capacity was stated in *In re Norwich Beef Co.*, 38 Agric. Dec. 380, 397-98 (1979), *aff'd*, No. H-79-210 (D. Conn. Feb. 6, 1981), *appeal dismissed*, No. 81-6080 (2d Cir. Jan. 22, 1982), quoting from *In re M.&H. Produce Co.*, 34 Agric. Dec. 700, 760-61 (1975), *aff'd on other grounds sub nom. M.&H. Produce Co. v. Knebel*, 549 F.2d 830 (D.C. Cir.) (unpublished), *reprinted in* 36 Agric. Dec. 470, *cert. denied*, 434 U.S. 920 (1977), as follows:

> Even if we were to assume that the facts in this case presented a case for equitable estoppel, I adhere to the traditional view that equitable estoppel does not apply to the Government acting in its sovereign capacity.
>
> As stated in *United States v. Georgia-Pacific Company*, 421 F.2d 92, 100-101 (C.A. 9):[25]

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[25] See also *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 383-386; Davis, *Administrative Law Treatise* (1958 ed. and 1970 supp.), §§ 17.01-17.04.

> Numerous cases reflect the position that equitable estoppels may be found against the Government in certain situations. Thus the courts have held that an equitable estoppel may be found against the Government

> (1) if the Government is acting in its proprietary rather than sovereign capacity; and (2) if its representative has been acting within the scope of his authority.
>
> (1) While it is said that the Government can be estopped in its proprietary role, but not in its sovereign role, the authorities are not clear about just what activities are encompassed by each. In its proprietary role, the Government is acting as a private concern would; in its sovereign role, the Government is carrying out its unique governmental functions for the benefit of the whole public.

Similarly, in *United States v. State of Florida*, 482 F.2d 205, 209 (C.A. 5), the Court stated:

> Whether the defense of estoppel may be asserted against the United States in actions instituted by it depends upon whether such actions arise out of transactions entered into in its proprietary capacity or contract relationships, or whether the actions arise out of the exercise of its powers of government. The United States is not subject to an estoppel which impedes the exercise of the powers of government, and is not estopped to deny the validity of a transaction or agreement which the law does not sanction. Sanitary Dist. v. United States, 266 U.S. 405, 45 S. Ct. 176, 69 L. Ed. 352 (1925); Utah Power & L. Co. v. United States, 243 U.S. 389, 37 S. Ct. 387, 61 L. Ed. 791 (1916). Nor does an estoppel arise through an act or representation made by an officer or agent without authority to act for the government in the premises. Wilber Nat. Bank v. United

States, 294 U.S. 120, 55 S. Ct. 362, 79 L. Ed. 798 (1935); Jeems Bayou Fishing & Hunting Club v. United States, 260 U.S. 561, 43 S. Ct. 205, 67 L. Ed. 402 (1922).

There is, however, some support for the view that in recent years, "the doctrine of sovereign immunity has begun to crumble, and so have the rules insulating the government from estoppel." *Gestuvo v. District Dir. of U.S. Immigration & Nat. Serv.*, 337 F. Supp. 1093, 1098 (C.D. Cal.). It has been said that estoppel now "hinges on only two considerations: estoppel is available if the government's wrongful conduct threatens to work a serious injustice and if the public's interest would not be unduly damaged by the imposition of estoppel" (*id.*, at 1099). See, also, *United States v. Lazy FC Ranch*, 481 F.2d 985, 989 (C.A. 9), in which the Court said that –

> estoppel is available as a defense against the government if the government's wrongful conduct threatens to work a serious injustice and if the public's interest would not be unduly damaged by the imposition of estoppel. Gestuvo v. District Dir. of I. N. S., 337 F. Supp. 1093 (C.D. Cal. 1971). This proposition is true even if the government is acting in a capacity that has traditionally been described as sovereign (as distinguished from proprietary) although we may be more reluctant to estop the government when it is acting in this capacity. *See Georgia-Pacific, supra.*

I believe that the older, traditional view best protects the public interest and should be adhered to. I would deal with wrongful conduct by Government employees through disciplinary

> actions, if their conduct warrants punishment, rather than by damaging the public interest to any degree.

In affirming my decision in *Norwich*, the court stated (*Norwich Beef Co. v. Bergland*, No. H-79-210, slip op. at 8-9 (Feb. 6, 1981)):

> First, it must be noted that when the government is processing inspection service applications, it is clearly acting in its sovereign capacity. That is, it is carrying out its unique governmental functions for the benefit of the whole public. The government is not subject to estoppel when it is acting in its sovereign role. *United States v. Georgia-Pacific Co.*, 421 F.2d 92, 100-01 (9th Cir. 1970). *See also Air-Sea Brokers, Inc. v. United States*, 596 F.2d 1008, 1011 (C.C.P.A. 1979).

To conclude this discussion, there is no factual or legal basis for Respondent's argument as to estoppel or lack of specific warning.

Respondent's fourth argument, again, is copied directly from Respondent's Brief filed with the ALJ, at 13. The ALJ discussed this issue as part of his *sanction* discussion, which I have modified, *supra*. Thus, my view is different from the ALJ on this argument.

I reject this due process and equal protection argument because it is based upon false premises; to wit, that the *bonding procedure* places "a licensee's entire business at risk," and that two classes of licensees are established, depending on whether a bond is ultimately obtained. In fact, only the licensee can *choose* to hire the restricted person. Only the licensee can *choose* to retain a restricted

person after notification; and without an approved bond, past 30 days. The procedures apply to all people – not classes of people, as argued by Respondent. Even if Respondent had ultimately obtained a bond in November 1993, Respondent would have been subject to the same type of disciplinary proceeding as the case here. Since Respondent did not obtain the required bond, there is no need to hypothesize as to whether the sanction would have been less, in that hypothetical situation, if Complainant had brought an action against Respondent, after Respondent had finally obtained the required bond. Consequently, I find that the procedures do not deny due process and equal protection as argued by Respondent in Argument 4.

Turning to the sanction, the Department's current sanction policy is set forth in *In re S.S. Farms Linn County, Inc.* (Decision as to James Joseph Hickey and Shannon Hansen), 50 Agric. Dec. 476, 497 (1991), *aff'd*, No. 91-70169 (9th Cir. Apr. 23, 1993) (Table) (text in WESTLAW) (not to be cited as precedent under 9th Circuit Rule 36-3), as follows:

> It is appropriate to state expressly the practice that has been followed by the Judicial Officer in recent cases, *viz.*, that reliance will no longer be placed on the "severe" sanction policy set forth in many prior decisions, e.g., *In re Spencer Livestock Comm'n Co.*, 46 Agric. Dec. 268, 435-62 (1987), *aff'd on other grounds*, 841 F.2d 1451 (9th Cir. 1988). Rather, the sanction in each case will be determined by examining the nature of the violations in relation to the remedial purposes of the regulatory statute involved, along with all relevant circumstances, always giving

> appropriate weight to the recommendations of the administrative officials charged with the responsibility for achieving the congressional purpose.

On the need for a sanction, I agree with the views of the administrative officials responsible for administering the Act. Respondent continued the prohibited employment of Cali almost 4 months after the 30-day notice period expired, notwithstanding three letters (not counting the November 8, 1993, letter or the letter to Cali's attorney) and a phone call. However, I differ with the ALJ on the length of the suspension, because I agree with Complainant's (modified) recommendation for a 90-day suspension.

The ALJ's disagreement with Complainant's original recommendation that revocation was the proper sanction is based upon the ALJ's finding that there was not substantial evidence to support revocation. The ALJ made several key conclusions in this regard, which form the basis for the ALJ's substituted 30- day suspension, which include: that the Complainant bases its recommendation on the premise that to protect farmers, only financially responsible persons may operate under PACA (citing *Midland Banana & Tomato Co., supra*, Initial Decision at 11); that the Complainant's belief, that Mr. Cali is such an irresponsible person due to Mr. Cali's history, is an exaggeration, because Mr. Cali had only one instance of inability to pay and that was because of a cooler failure (*Id.*); that although Mr. Cali was president of Royal Fruit, this was in name only, the key person being Robert Heimann (*Id.*); that Complainant's accusation that Mr. Cali is a "great risk" to the industry is "hyperbole,"

because there are no complaints filed against Mr. Conforti, his company (C&C Produce) is financially healthy and solvent, and Mr. Conforti's suppliers say his payment practice and ethics are exemplary (*Id.* at 12); and that Complainant presented no evidence to show that a severe penalty was a necessary and reasonable means to show the industry that the Department is serious about nonpayment, and proper deterrents thereto (*Id.*).

I completely disagree with this analysis, and the 30-day suspension. There is substantial evidence to support the Complainant's case, and all that is required is a preponderance, as stated, *supra*. The ALJ has found, correctly, that Respondent violated the Act, section 8(b) (Initial Decision at 8). However, the ALJ based his 30-day suspension sanction upon his assessment that Respondent's employment of Mr. Cali, involved "some risk," that "a bond would have minimized the risk . . . ; but that Mr. Cali being considered a " 'great risk' to the industry is *hyperbole*" (Initial Decision at 12) (Emphasis added).

The ALJ states that, "[a]s of the date of the hearing in this case on April 26, 1994, Royal Fruit still owed . . . $92,000" (Initial Decision at 2). The ALJ based his risk assessment, in part, on the above nonpaid reparations amount. However, in the same paragraph from which this $92,000 figure is taken is a citation by the ALJ to the Initial Decision in the disciplinary action against Royal Fruit (*Midland Banana & Tomato Co.* (July 26, 1994)). Therefore, *Midland Banana* was quoted from, and thus fully available to the ALJ in this case, *sub judice*, to determine the extent of Mr. Cali's historical discrepancies *as of the date of the issuance of the ALJ's Initial Decision herein* (July 28, 1994).

The ALJ did not mention the following available numbers which were stipulated by the Respondents, Royal Fruit Co., et al., in the Answer, and by the parties at the hearing, as follows (*Midland Banana, supra,* slip op. at 15) (emphasis added):

> **I. Royal Fruit Company, Inc.**
>
> The Complaint alleges that Royal failed to make full payment promptly of the agreed purchase prices for perishable agricultural commodities that it purchased, received and accepted in interstate and foreign commerce. In its Answer, *Royal admitted to the unpaid debts as alleged.* As more specifically set out in paragraph III of the Complaint, during the period July 1992 through November 1992, Royal failed to make full payment promptly to *21 sellers for 97 lots of perishable agricultural commodities in the total amount of $500,370.54.* At the hearing, *the parties stipulated that this amount had been reduced to $423,302.70,* in light of a PACA trust distribution of over $77,000 to the creditors of Royal. (Tr.36).[9]

Thus, the ALJ erroneously based his risk assessment, in part, on only the nonpaid reparation orders of $92,000 as of April 26, 1994, while the updated case information

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[9] On January 31, 1995, official notice was taken of the Initial Decision in *Midland Banana,* with opportunity afforded to the parties to "show the contrary" (5 U.S.C. § 556(e)). Respondent's objections are rejected because (i) I am noticing the same decision referred to by the ALJ, (ii) the facts I am noticing were "stipulated" by Royal Fruit, and (iii) Respondent has no standing to collaterally attack Complainant's determination as to Cali.

shows *stipulated* arrearages of at least $423,302.70, from 21 sellers for 97 lots of perishable agricultural commodities totalling $500,370.54. At the very least, this shows that Complainant is fully vindicated in calling Mr. Cali a "great risk" to the industry, that Mr. Cali had a history of nonpayment, and that Complainant's concern was neither "hyperbole" nor "exaggeration."

Complainant is also correct that the PACA was passed into law to protect farmers from the financial chaos that occurs from financially irresponsible persons trafficking in perishable produce. As stated in *Tri-County Wholesale Produce Co. v. USDA*, 822 F.2d 162, 163 (D.C. Cir. 1987):

> Congress enacted PACA in 1930 in an effort to assure business integrity in an industry thought to be unusually prone to fraud and to unfair practices. A later Congress summarized the purpose of the Act succinctly:
>
> > [PACA] was enacted in 1930 for the purpose of providing a measure of control and regulation over a branch of industry which is engaged almost exclusively in interstate commerce, which is highly competitive, and in which the opportunities for sharp practices, irresponsible business conduct, and unfair methods are numerous. The law was designed primarily for the protection of the producers of perishable agricultural products – most of whom must entrust their products to a buyer or commission merchant who may be thousands of miles away, and depend for their payment upon his business acumen and fair dealing – and for the protection of consumers who frequently

> have no more than the oral representation of the dealer that the product they buy is of the grade and quality they are paying for. (S. Rep. 2507, 84th Cong., 2nd Sess. 3 (1956)).
>
> As this court has stated previously, "the goal of [PACA is] that only financially responsible persons should be engaged in the businesses subject to the Act." *Finer Foods Sales Co., Inc. v. Block*, 708 F.2d 774, 782 (D.C. Cir. 1983), *citing Zwick v. Freeman*, 373 F.2d 110, 117 (2d Cir.), *cert. denied*, 389 U.S. 835, 88 S.Ct. 43, 19 L.Ed.2d 96 (1967), *quoted in Marvin Tragash Co. v. United States Dep't of Agric.*, 524 F.2d 1255, 1257 (5th Cir. 1975). To this end, PACA requires dealers in perishable agricultural commodities to obtain licenses from the Secretary of Agriculture.

As far as the ALJ's conclusions that Mr. Cali had only one instance of inability to pay, based upon a cooler failure, the *Midland Banana* case has the correct figures for nonpayment. I do not find credible the loss of one-half of a million dollars of produce over 5 months due to *one* cooler failure, when Royal Fruit only did about 10 million dollars a year total business (1990). Indeed, as stated in one of the reparation decisions against Royal Fruit, "All but the last one or two shipments of strawberries should already have been paid for in full by the time the respondent's cooler broke down" (CX 2, p. 17). And as stated in another of the reparation decisions, "the breakdown of respondent's equipment occurred in May 1992, some five months before respondent purchased the two loads in question from complainant. Respondent surely knew by that time that it was having cash flow problems and

would not be able to timely pay for any purchases it might make" (CX 2, at 10-11).

The ALJ's other conclusions about Mr. Conforti's ethics, payment practices, complaints against C&C Produce, and the financial health of Mr. Conforti's company are irrelevant to the nonpayment of Mr. Cali's producers, or to Respondent's employment of Mr. Cali without the required bond. As discussed below, I reject these in mitigation of the sanction for employing Mr. Cali, to the extent that the ALJ uses these conclusions to decrease the "great risk" of hiring Mr. Cali. Congress – not this Department – has determined that there is an unacceptable risk to the produce industry to permit a licensee to hire a person such as Mr. Cali without a bond. 7 U.S.C. § 499h(b).

The other noteworthy conclusion herein is the one that states that, "although Cali was president [of Royal Fruit Co.] in name, the key figure in the operation of Royal Fruit was a Robert Heimann who was named personally in that case as a respondent because of his close involvement with the business" (Initial Decision at 11). However, a close reading of *Midland Banana* reveals a different situation than the one the ALJ concluded. The Complainant has summarized succinctly the conclusions of the ALJ in *Midland Banana*, which summary I adopt as my own (Complainant's Appeal Petition and Supporting Brief," pp. 6-8 (Aug. 23, 1994)), as follows:

> [The ALJ] dismisses Mr. Cali's role as president and 33.3% stockholder in Royal, claiming that the key figure in Royal's operations was a Robert Heimann and, further, that complainant named Mr. Heimann as a respondent in that

case because of his close involvement with the business (Initial Decision at p. 11). However, [the ALJ] distorts [the other ALJ's] findings and conclusions in *In re Midland*.

Although [the ALJ] in *In re Midland, supra,* at 17, concluded that Mr. Heimann was "a key figure" in Royal's business, he did not conclude that Mr. Heimann was the only figure exercising direction, management and control of Royal. Mr. Cali was also extremely important to Royal, as shown by a host of references in the *In re Midland* decision. Mr. Cali was one of the original partners of Royal, before it became incorporated (*In re Midland, supra,* at 3). Royal was sold to Mr. Cali and his associates with the understanding that Mr. Cali and another would manage the business (*In re Midland, supra,* at 4, 17). In order to pay for the purchase of Royal, Mr. Cali and two others applied for and received a Small Business Administration loan for $125,000.00 (*In re Midland, supra,* at 5, 18). When Royal was incorporated, Mr. Cali and two others were identified as directors and equal shareholders, each receiving 33.3% of the stock and, at the first corporate meeting, Mr. Cali was elected president (*In re Midland, supra,* at 5). Royal's 1991 tax return shows that the shares of one of the three shareholders was retired, leaving Mr. Cali with 50% of Royal's stock (*In re Midland, supra,* at 5). Royal's 1991 tax return also shows that Mr. Cali received $24,196.00 in property distributions (*In re Midland, supra,* at 6). In December 1989, Royal purchased a larger location, with the funds for the purchase price and improvements to the property provided by another Small Business Administration loan for $525,000.00, secured by the assets of Royal and the personal guarantees

of Mr. Cali and three others (*In re Midland, supra,* at 7). It is apparent that [the *Midland* ALJ] considered Mr. Cali to play an important role in the operations of Royal.

Further, [the ALJ's] conclusion [in the case, *sub judice,*] that complainant personally named Mr. Heimann as a respondent in *In re Midland* because of Mr. Heimann's controlling role in Royal (Initial Decision at p. 11) is misleading, as it implies that complainant did not believe Mr. Cali had significant control over Royal. It has always been complainant's position that Mr. Cali was one of the persons who directed, managed and controlled Royal. This is illustrated in the complaint filed in *In re Midland,* which alleges, at paragraph II(d) [exhibit omitted], that Mr. Cali, as well as Mr. Heimann and Mr. Heimann's son, were all responsible for the management, direction and control of Royal.

The rationale for naming Mr. Heimann as a respondent was expressed during the *In re Midland* hearing by the complainant's sanction witness, John Clark (Tr. at 557-560) [exhibit omitted]. As Mr. Clark explained, when complainant files actions against corporations for violations of the PACA, the officers, directors and greater than 10 percent shareholders of such corporations are not personally named as respondents because those persons are considered responsibly connected with the corporation (7 U.S.C. § 499a(9)). The responsibly connected status of such persons will result in the imposition of certain employment restrictions if the corporation is found to have committed the alleged violations (7 U.S.C. § 499h(b)). As Mr. Cali was in a responsibly connected position

> with Royal, he would be subject to employment restriction once Royal was found to have violated the PACA. Mr. Heimann was not in a responsibly connected position with Royal as he was neither an officer, director nor stockholder. Therefore, Mr. Heimann would not incur any employment restrictions as a result of Royal's violations. As the complainant believed that Mr. Heimann bore considerable responsibility for the violations of Royal and wished to ensure that Mr. Heimann would incur employment restrictions once it was found that Royal had committed PACA violations, it decided to name Mr. Heimann as a respondent. This was never intended to [and I so hold that it did not] lessen the responsibility of Mr. Cali for Royal's PACA violations.[10]

The ALJ also states that the Complainant has not shown the "hard evidence, actual experiences or studies showing [that the recommended sanction]" has a greater deterrent effect than a lesser penalty (Initial Decision at 10). However, the Act and the case law do not require what the ALJ demands. Indeed, it would be *impossible* to conduct such controlled studies to determine the deterrent effect of particular sanctions in cases of this type, where a licensee hires a restricted person without a bond,

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[10] On January 31, 1995, official notice was taken of the Complaint in *Midland Banana*, together with Mr. Clark's testimony on pages 557-60 of the hearing, with opportunity afforded to the parties to "show the contrary" (5 U.S.C. § 556(e)). Respondent's objections are rejected because the documents noticed refer to the same matters referred to by the ALJ, and Respondent has no standing to collaterally attack Complainant's determination as to Cali.

in view of the small number of such cases. I go years at a time without a single such case. I have had only six such cases in the last 10 years, including the present case and *Midland Banana & Tomato*, now pending. Administrative judgment is particularly important in this nebulous area.

Finally, with respect to Complainant's appeal relating to willfulness, I agree with Respondent and the ALJ that the prior notice given in this case (the Complainant's June 24, 1993, letter; Finding of Fact 8) makes a showing of willfulness unnecessary under 5 U.S.C. § 558(c) of the Administrative Procedure Act (APA), which states:

> Except in cases of willfulness or those in which public health, interest, or safety requires otherwise, the withdrawal, suspension, revocation, or annulment of a license is lawful only if, before the institution of agency proceedings therefor, the licensee has been given –
>
> (1) notice by the agency in writing of the facts or conduct which may warrant the action; and
>
> (2) opportunity to demonstrate or achieve compliance with all lawful requirements.

In my administrative judgment, I concur in the administrative judgment of the PACA officials that a 90-day suspension order is necessary to achieve the purpose of section 8(b) of this remedial statute (7 U.S.C. § 499h(b)). Respondent deliberately chose to employ Mr. Cali, and to continue Cali's employment for almost 4 months after the 30-day notice period, without obtaining the required bond. Good faith efforts to *attempt to obtain a bond* do not excuse or mitigate *deliberate employment* of

Cali *without having the required bond.* Complainant's letters, quoted above, repeatedly said that the bond was a "prerequisite" to the continued employment of Cali (CX 4, pp. 5, 10, 11, 12). "Prerequisite" means something that is "required beforehand" (WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE, UNABRIDGED 1791 (1981)). Even if Respondent did not understand that "prerequisite" means required *beforehand,* the letters expressly state that to continue Cali's employment after 30 days from receipt of the warning letter "without posting the surety bond and obtaining the USDA's approval could result in the suspension or revocation of your firm's PACA license" (CX 4, p. 2; and see CX 4, pp. 5, 11, 12).

Respondent deliberately chose not to heed that warning. He deliberately chose, instead, to continue to employ Cali, without having the bond. He waited until November 19, 1993, to terminate Mr. Cali's employment. (Mr. Cali even made a couple of phone calls in December 1993 to complete a sale of fruit baskets.) Respondent's action subjected the industry to a risk deemed by Congress to be unacceptable (7 U.S.C. § 499h(b)). In prior cases, licenses have been revoked for similar employment-restriction violations. *In re DiCarlo Distributors, Inc.,* 53 Agric. Dec. ___ (Nov. 7, 1994), *appeal docketed,* No. 94- 4218 (2d Cir. Nov. 21, 1994); *In re Tri-County Wholesale Produce Co.,* 45 Agric. Dec. 286, 326 (1986), *aff'd per curiam,* 822 F.2d 162 (D.C. Cir. 1987), *reprinted in* 46 Agric. Dec. 1105 (1987). In *In re Danny L. Brand,* 53 Agric. Dec. ___ (Sept. 23, 1994), *appeal docketed,* No. 94-9311 (11th Cir. Nov. 20, 1994), the Respondent was found unfit to receive a PACA license

for a similar employment-restriction violation. In the present case, Complainant's recommendation for a 90-day suspension order is fully warranted by Respondent's deliberate conduct in subjecting the produce industry to a risk determined by Congress to be unacceptable (7 U.S.C. § 499h(b)), after repeated warnings.

There are significant differences between the facts and circumstances here and the facts and circumstances involved in *ABL Produce, Inc. v. USDA*, 25 F.3d 641 (8th Cir. 1994), in which the court reversed my Order revoking ABL's license for employing Mr. Lombardo, a person subject to the employment restrictions of PACA. The court instructed that the sanction should be reduced to a 30-day suspension. In *ABL Produce*, the court reversed, in part, on the grounds that it was improper to consider the violation "repeated," stating (25 F.3d at 646) (emphasis added):

> As to the second factor, it is misleading to assert that the violation was repeated simply because Lombardo was not terminated until March of 1992. *This might have some bearing if Lombardo had daily involvement in ABL's activities, but this is not the case.* Several of ABL's customers testified that they conducted business dealings through Lombardo, but also clearly indicated that they did not always do so; in fact, the impression left by these witnesses is that they usually dealt with people other than Lombardo. The record also demonstrates that most of Lombardo's activities involved ACME, which involvement is not the basis for this action. *See* footnote 3, *supra*. Though it is true that Lombardo did not leave Middendorf's employ until March of 1992, this

> does not accurately portray the degree of Lombardo's involvement in ABL's business activities.

In the present case, Cali had "daily involvement" in Conforti's activities. Hence this case is clearly distinguishable from *ABL Produce*. Nonetheless, I do not make a finding here that Conforti's violations were repeated. I merely note as a relevant circumstance that, during the period from July 24, 1993, through November 19, 1993, Cali had daily involvement in Conforti's activities.

A second distinguishing feature is that in *ABL Produce*, ABL tried to prevent Lombardo from involving himself in the company's activities, but was unsuccessful. As stated by the court (25 F.3d at 646):

> It is clear from the record that ABL tried, albeit unsuccessfully, to prevent Lombardo from involving himself in the company's activities. . . . We also note that the brunt of the sanction, if upheld, will be most keenly felt by Middendorf personally; as a person "responsibly connected" to ABL, Middendorf will be required to disassociate himself from his other PACA- licensed company. *See* 7 U.S.C. § 499h(b) (1988); *cf. Ferguson*, 911 F.2d at 1282 ("Our conclusion is not based upon but is strengthened by the fact that the six-month suspension would likely put Ferguson out of business."). This is particularly important in light of the most compelling and unique circumstance contained in the record: the fact that Lombardo engaged in deceptive acts to hide his activities from Middendorf and issued threats to prevent those who discovered his involvement from reporting to Middendorf.

In the present case, Conforti is the person who will most keenly feel the sanction, but, unlike Middendorf, Conforti hired Cali personally, and knew full well that Cali was involved daily in Conforti's business activities.

A third distinguishing feature is that Middendorf received only two warning letters, whereas Conforti received three warning letters (not counting the November 8, 1993, final warning letter or the letter to Cali's attorney) and one telephone call, each of which advised him that the Act required him to have a bond before he could employ Cali (after the 30-day notice period). (The telephone call is summarized in the letter to Cali's attorney, which is not included in the three warning letters to Conforti.) Hence Conforti received twice as many warnings as Middendorf. (Respondent might counter by arguing that Lombardo was in Middendorf's employ longer than Cali was in Conforti's employ, but, as the court noted (25 F.3d at 646):

> Though it is true that Lombardo did not leave Middendorf's employ until March of 1992, this does not accurately portray the degree of Lombardo's involvement in ABL's business activities.

There are two reasons why there is no need for me to consider whether Conforti's violation was "flagrant" or "repeated." In the first place, no revocation order is being issued, and even under section 8(a) of the PACA (7 U.S.C. § 499h(a)), which is not applicable here, a finding of repeated or flagrant is necessary only to support a revocation order. In the second place, in section 8(b) of the Act (7 U.S.C. § 499h(b)), which is involved here, the statutory authorization even to revoke is not limited to

flagrant or repeated violations. The Act merely states in section 8(b), applicable here, that (7 U.S.C. § 499h(b)):

> The Secretary may, after thirty days notice and an opportunity for a hearing, suspend or revoke the license of any licensee who, after the date given in such notice, continues to employ any person in violation of this section.

In contrast, where a person violates section 2(4) of the Act (7 U.S.C. § 499b(4)), e.g., by failing to pay for produce,[11] section 8(a) of the Act limits revocation orders to repeated or flagrant violations. Specifically, section 8(a) of the Act provides (7 U.S.C. § 499h(a)):

> (a) Whenever (1) the Secretary determines, as provided in section 499f of this title, that any

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[11] Section 2(4) provides (7 U.S.C. § 499b(4) (emphasis added)):

It shall be unlawful in or in connection with any transaction in interstate or foreign commerce –

. . . .

(4) *For any commission merchant, dealer, or broker* to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer, or the purchase or sale of which in such commerce is negotiated by such broker; or *to fail or refuse truly and correctly to* account and *make full payment promptly* in respect of any transaction in any such commodity to the person with whom such transaction is had; or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction; or to fail to maintain the trust as required under section 499e(c) of this title.

> commission merchant, dealer, or broker has violated any of the provisions of section 499b of this title[, i.e., section 2, including section 2(4) relating to failure to pay], or (2) any commission merchant, dealer, or broker has been found guilty in a Federal court of having violated section 499n(b) of this title, the Secretary may publish the facts and circumstances of such violation and/or, by order, suspend the license of such offender for a period not to exceed ninety days, except that, if the violation is flagrant or repeated, the Secretary may, by order, revoke the license of the offender.

Since section 8(b) of the Act, involved here, unlike the immediately preceding paragraph in the Act (section 8(a) of the Act), does not limit revocation orders to flagrant or repeated violations, or even limit suspension orders to 90 days, the rule of reason should be read into the Act. But the failure to limit revocation authority to repeated or flagrant violations of the employment restrictions in section 8(b) of the Act, while limiting revocation authority in section 8(a) to repeated or flagrant violations of section 2 (which includes failure to pay), suggests that Congress regarded employment-restriction violations (after notice) as more serious than violations of section 2 of the Act, such as failure to pay. A basis for that viewpoint is that an employment- restriction violation of section 8(b) does not become actionable until after 30 days' notice to the licensee that he cannot continue to employ a restricted person, without an approved bond. Such a notice is given only in circumstances where Congress has determined that there is a threat to the financial integrity of the industry if a particular type of person (one who has failed to pay a reparation award within 2 years, or whose

license has been revoked) is employed without a satisfactory bond.

Before discussing the court's holding in *ABL Produce* that ABL's violation was not flagrant, one further slight refinement is necessary for a full understanding of the employment restrictions in section 8(b). Specifically, it is a violation of the express terms of section 8(b) of the Act for a licensee to employ a person, without the Secretary's approval, who has failed to pay a reparation award, *irrespective of whether a notice letter is sent*. That is, the Act states (7 U.S.C. § 499h(b) (emphasis added)):

> (b) *Except with the approval of the Secretary, no licensee shall employ any person,* or any person who is or has been responsibly connected with any person –
>
> . . . .
>
> (3) *against whom there is an unpaid reparation award* issued within two years, subject to his right of appeal under section 499g(c) of this title.

However, there is no sanction for violating that express command unless a notice (or warning) letter is sent (7 U.S.C. § 499h(b)). The reason for that statutory scheme is based on the fact that ordinarily, at least, licensees have no way of knowing that someone in their employment has failed to pay a reparation award within 2 years. A list of such restricted persons is not published in the Federal Register, and licensees are under no legal or moral obligation to try to ascertain whether an employee has failed to pay a reparation award. The statute places the burden on the Secretary to expressly advise

a licensee that a person is subject to employment restrictions, and to give the licensee 30 days in which to obtain a bond.

This background leads to a discussion of the court's holding in *ABL Produce* as to whether ABL's violation was flagrant. The court stated (25 F.3d at 646) (emphasis added):

> Initially, we are troubled by the Secretary's determination that ABL's violations were . . . flagrant. In making this finding, the JO relied exclusively on the sanction witnesses' testimony. The sanction witness opined that the violations were . . . flagrant because the affiliation continued after the Department notified ABL not to employ Lombardo and because the employment continued until Lombardo was terminated in March 1992. The first factor cannot be determinative because, as discussed earlier, the APA requires all licensees to receive notice before a license is revoked. *The fact that ABL received the notice required by law does not mean that the violation was flagrant.* . . .

As stated by the court, the APA requires a notice (or warning letter) before a licensee can be revoked (or even suspended), unless the violation is willful (5 U.S.C. § 558(c)). And as stated in my discussion leading into this subject matter, licensees are under no legal or moral obligation to keep track of which persons are subject to employment restrictions, and there is no actionable violation of section 8(b) until 30 days after a warning notice is sent. Accordingly, I agree fully with the court's statement that, the "fact that ABL *received* the notice required by law does not mean that the violation was flagrant (emphasis

added)." I would go even further. The fact that ABL *received* the notice required by section 8(b) (and the APA, if the violation was not willful) does not even remotely suggest that ABL's conduct was blameworthy in the slightest degree. But the issue in *ABL Produce* was not whether the fact that ABL *received* the notice meant that the violation was flagrant. The issue was, was it flagrant for ABL to *fail to heed* the warning contained in the notice letter.

In the present case, if I were to make a finding as to whether the violation was flagrant, the issue would be, "Was it a flagrant violation for Conforti to violate the express terms of section 8(b) of the Act, by continuing to employ Cali, without the Secretary's approval and the required bond, after the 30-day notice period, considering the circumstances that Conforti was sent a copy of the Act on June 16, 1993, together with a letter advising him of the express requirements of section 8(b) of the Act, and warning him that to continue his employment of Cali, without the required bond, after 30 days from the receipt of the letter, could result in the suspension or revocation of his PACA license (CX 4, pp. 1-2), and that Conforti received two additional warning letters (CX 4, pp. 10, 11) (not counting the November 8, 1993, letter or the letter to Cali's attorney) and a warning telephone call (summarized in CX 4, p. 5) advising him of the statutory provisions, and with three of the four warnings (two letters and a phone call) expressly advising him that the sanction for a violation could include suspension or revocation of his license (CX 4, pp. 1-2, 5, 11)"? I do not answer that question here since I am not revoking Conforti's license, and even if I were revoking his license, as shown

above, the Act does not require a flagrant or repeated finding in order to revoke a license where a person violates the employment restriction provisions in section 8(b) after the 30-day notice period.

Nonetheless, without finding that Conforti's conduct was repeated or flagrant, I note as a relevant circumstance that Conforti deliberately, intentionally and knowingly violated the express provisions of section 8(b) of the Act by continuing his employment of Cali without the required bond notwithstanding the fact that he received three warning letters (not counting the final November 8, 1993, letter or the letter to Cali's attorney) and one warning telephone call (summarized in the letter to Cali's attorney) with respect to this matter, with three of the four warnings expressly advising him that the sanction for a violation could include suspension or revocation of his license.

The court further said in *ABL Produce* (25 F.3d at 646):

> Though there is no denying that the violation calls for a punishment, consideration of the "relevant circumstances" should include consideration of the statute's purpose. Here, none of ABL's bills went unpaid, so nobody has suffered the harm PACA was primarily designed to prevent.[12]

In the present case, none of Conforti's bills went unpaid. However, the entire purpose of the employment-restriction provisions of section 8(b) of the Act were

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[12] This issue was not raised before me in *ABL Produce*, so this is my first opportunity to address this matter.

defeated by Conforti's conduct. As stated above, the purpose of section 8(b) of the Act (7 U.S.C. § 499h(b)) is to prevent the produce industry from being subjected to a risk regarded by Congress as intolerable. The produce industry was subjected to that intolerable risk for almost 4 months by Conforti's conduct. The extent of that risk is measured by the amount of the required bond, *viz.*, $100,000 (CX 4, pp. 7, 13). If Conforti had also failed to pay his bills, that would have been a further violation, namely, of section 2(4) of the Act (7 U.S.C. § 499b(4)), for which Congress provided a remedy in section 8(a) of the Act (7 U.S.C. § 499h(a)), *viz.*, authority to suspend or revoke (in the case of flagrant or repeated violations) the license of any licensee who fails to pay for produce. In the present case, if Conforti had failed to pay his bills, that would not have been actionable under section 8(b) of the Act, involved here, but, rather, under section 8(a) of the Act. Accordingly, the fact that there is no failure to pay should not be regarded as a mitigating circumstance where the violation is failing to have a bond before continuing the employment of a restricted person (after 30 days' notice). The statutory requirement for a bond in section 8(b) of the Act is to provide a safety net for the protection of the industry, where a person who has previously failed to pay reparation awards, or whose license was revoked, is employed by another licensee. The required safety net here, a $100,000 bond, was totally missing for a period of about 4 months. The fact that the safety net was not needed, because Conforti did not fail to pay, should not be regarded as a mitigating circumstance for the violation of failing to have the required safety net.

The foregoing issue is not only of great importance to the Secretary of Agriculture, but also to other federal agencies, state agencies, and other regulatory bodies, in a wide variety of circumstances where safety-type requirements are enforced. For example, in disciplining a probate attorney for continually commingling trust funds with his personal funds, after several warnings, is it a mitigating circumstance that the attorney did not also fail to pay the fiduciaries in full? If required smoke detectors or sprinkler systems are not in place or operative, is it a mitigating circumstance that no fire actually occurred? If truckers, airline pilots, or railroad engineers work continuously in excess of specified limits, without rest, is it a mitigating circumstance that no accident actually occurred? If required lifeboats or life jackets are not provided on a passenger ship, is it a mitigating circumstance that the ship did not sink? If required airplane maintenance procedures are not performed, is it a mitigating circumstance that the airplane did not crash? If a person is charged with exceeding the speed limit, running a red light, or driving under the influence of alcohol, is it a mitigating circumstance that no accident occurred? Where there is a requirement for the mandatory use of seat belts, or the mandatory use of car seats for young children, is it a mitigating circumstance that no accident occurred? As to all of these hypothetical examples, if tangible damage actually occurred from the failure to comply with the safety requirements, *additional* charges, with greater sanctions, might have ensued. But the fact that the violations charged did not actually cause damage would not be regarded as a mitigating circumstance *for the violations charged*.

The court further stated in *ABL Produce* that consideration should be given to the fact that, "until this episode, neither Middendorf nor his companies have committed violations of PACA or any other statutory scheme administered by the Secretary" (25 F.3d at 646-47). The same is true here. That is certainly a relevant consideration. But I believe that a 90-day suspension order is, nonetheless, appropriate where, as here, Conforti has, for almost 4 months, subjected the produce industry to a risk regarded by Congress as intolerable, by continuing to employ Cali without the required bond after the 30-day notice period, after receiving three warning letters (not counting the November 8, 1993, letter or the letter to Cali's attorney) and one telephone call with respect to the matter. Such a deliberate, knowing, and intentional violation of the Act, continuing over a period of almost 4 months, fully warrants, in my administrative judgment, a 90-day suspension order for Conforti's first violation of the Act. Twenty-one sellers who sold 97 lots of produce to Cali lost over $400,000. Congress did not want Cali employed by any other firm unless that firm put up a bond. Conforti knew of the requirements of the Act, but refused to follow them. He put himself above the law. It was apparently his view that, as long as he was attempting in good faith to get a bond, he did not have to comply with the Act of Congress requiring him to get the bond first, and then hire Cali later. Although Conforti's employment of Cali did not result in actual damage to produce shippers, we know to a certainty that if such violations are not deterred, there will be a case where an employment-restriction violation results in substantial losses to produce shippers, and there will be no bond to

assure payment. If the remedial purposes of this regulatory program are to be achieved, persons like Conforti, who place themselves above the law, must be sanctioned adequately to deter such conduct by others. In my administrative judgement, concurred in by the administrative officials charged with responsibility for enforcing this remedial statute, 90 days is the appropriate sanction.

For the foregoing reasons, the following Order should be issued.

Order

Respondent's license is suspended for 90 days.

The facts and circumstances as set forth herein shall be published.

This Order shall take effect on the 30th day after service thereof on Respondent.

Done at Washington, D.C.

February 28, 1995

/s/ Donald A. Campbell
Donald A. Campbell
Judicial Officer

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:	)	PACA Docket
	)	No. D-94-524
John J. Conforti, d/b/a	)	
C & C Produce,	)	**Order Taking Official Notice**
	)	
Respondent	)	

Pursuant to the Rules of Practice (7 C.F.R. § 1.145(i)),[1] official notice is taken of the following documents (attached hereto) from *In re Midland Banana & Tomato Co., Inc.*, and *In re Royal Fruit Co., Inc.*, PACA Docket Nos. D-93-548 and D-93-549:

1. Decision and Order filed July 26, 1994, by the ALJ;

2. Complaint filed August 25, 1993, in Docket No. D-93-549; and

3. Transcript of a portion of the testimony at the hearing held on March 23, 1994, of John M. Clark, Senior Marketing Specialist, Trade Practices Section, PACA Branch (Tr. 557-60).

Respondent will be afforded 10 days after service of this Order within which "to show the contrary" (5 U.S.C. § 556(e)), if Respondent requests such opportunity, either in writing to the Hearing Clerk or in a telephone call to

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[1] *See In re Dane O. Petty*, 43 Agric. Dec. 1729 (1984) (Order Denying Objections to Official Notice and Petition for Reconsideration), *aff'd*, No. 3-84-2200-R (N.D. Tex. June 5, 1986).

the Judicial Officer's office (202-720-4764), by February 3, 1995.

Done at Washington, D.C.

January 31, 1995

/s/ Donald A. Campbell
Donald A. Campbell
Judicial Officer

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:	)	PACA Docket
	)	No. D-93-548
Midland Banana & Tomato Co., Inc., Susan E. Heimann, Robert S. Heimann, and Jeffrey B. Heimann,	)	
Respondents	)	
AND		
Royal Fruit Co., Inc., and Robert S. Heimann,	)	PACA Docket
	)	No. D-93-549
Respondents	)	

DECISION AND ORDER

These are consolidated proceedings instituted pursuant to the Perishable Agricultural Commodities Act, 1930, as amended, 7 U.S.C. § 499a *et seq.* (the "Act" or "PACA"), by Complaints filed on August 25, 1993, by the Director of the Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture ("USDA").

The Complaint in PACA Docket No. D-93-549 alleges that Respondent Royal Fruit Co., Inc. ("Royal"), under the direction, management and control of Robert S. Heimann, willfully violated section 2(4) of the Act (7 U.S.C. § 499b(4)) by failing make full payment promptly to 21 sellers of 97 lots of produce totalling $500,370.54. The Complaint in PACA Docket No. D-93-548 alleges that the license application of Respondent Midland Banana &

Tomato Co., Inc. ("Midland"), contained false and misleading statements with respect to the history and management of the corporation and was therefore wrongfully obtained.

Respondents in the disciplinary proceeding against Royal admit the failure to pay for produce, but deny that Robert Heimann was an owner or responsible for the direction, management or control of Royal. Respondents in the Midland proceeding essentially deny all material allegations. The cases were consolidated by Order filed on November 3, 1993.

I presided over a hearing on March 22-24, 1994, in Kansas City, Missouri. Complainant was represented by Eric Paul, Esq., Office of the General Counsel, United States Department of Agriculture. Respondents were represented by Richard L. Katz, Esq., of Coral Gables, Florida. Complainant's exhibits are referred to as "CX"; Respondents' exhibits are referred to as "RX"; and the hearing transcript is referred to as "Tr." The parties filed proposed findings of fact, proposed conclusions of law and briefs, with the last being filed on July 7, 1994. All proposed findings, proposed conclusions, and arguments have been considered. To the extent indicated, they have been adopted. Otherwise, they have been rejected as irrelevant or not supported by the evidence.

Findings of Fact

1. Robert S. Heimann is an individual currently residing at 10303 Howe Lane, Leawood, Kansas 66206. (Answer). Mr. Heimann has been involved in the produce business for over 30 years (CX 18, p. 7), and is currently

employed with Gallo Produce and Food Products, Inc., in Kansas City, Missouri. (Tr. 373). Robert Heimann and Beverly Heimann are husband and wife. (Tr. 386).

2. Robert Heimann owned and managed a produce brokerage known as the Gilbert Corporation in the mid-1970's. (CX 18, p. 6).

3. Jeffrey B. Heimann is an individual currently residing in Key Largo, Florida (Tr. 580), and was first employed in the produce business beginning in 1988 at Royal Fruit Company. Prior to that time, he was employed at the investment firm of Dean Witter in Phoenix, Arizona. (Tr. 581). Jeffrey Heimann is the son of Robert and Beverly Heimann.

4. Susan E. Heimann is an individual residing at 946 Tennessee, Lawrence, Kansas, and is currently a full-time college student at the University of Kansas, in Lawrence, Kansas. (Answer; Tr. 463-64). Susan Heimann is the daughter of Robert and Beverly Heimann and sister of Jeffrey Heimann.

5. On October 13, 1988, PACA License No. 890046 was issued to Royal Fruit Co., 313 Main Street, Kansas City, Missouri 64105, a partnership whose partners were identified on the license as being Joseph Cali, Jeff Heimann, and Beverly Heimann. (CX 2, p. 5). On November 21, 1988, a certificate of incorporation was issued to Royal Fruit Company by the State of Missouri. (RX 1, p. 1).

6. Following the submission of a license renewal application showing the change from a partnership to a corporation (CX 2), PACA License No. 900296 was issued

to Royal Fruit Co., Inc., on January 1, 1989. (CX 1). The license was terminated on December 1, 1992, pursuant to section 4(a) of the Act (7 U.S.C. § 499d(a)), when Royal failed to pay the required annual renewal fee. (Answer). At the time of the license termination, Royal had relocated to 303 Grand Avenue, Kansas City, Missouri 64106. (CX 1, p. 2).

7. The Heimann family first became involved with Royal in 1988, when Robert Heimann was associated with United K.C., Inc. ("UKC"), another produce firm in the Kansas City area. (Tr. 633-34). Mr. Heimann was approached by Louis Ribaste, who at that time was the owner of Royal, about the possible purchase of Royal on behalf of Mr Heimann's employer, UKC. (Tr. 633-34). When it became apparent that UKC was not interested in the purchase of Royal, one of Robert Heimann's coworkers at UKC, Joe Cali, expressed an interest in Royal. (Tr. 379, 634-35). Mr. Cali and Robert Heimann's son, Jeff Heimann, who at that time was a stockbroker in Phoenix, Arizona, but who was anxious to embark on a more lucrative career (Tr. 582-84, 635), wanted to operate Royal as partners. (Tr. 379, 585-86, 635-36).

8. Because Mr. Ribaste perceived Jeff Heimann and Joe Cali to be relative newcomers to the produce business, he was reluctant to sell Royal to them. Instead, he agreed to sell Royal to Robert Heimann, and Jeff Heimann and Joe Cali would manage the business. (Tr. 230-32, 585-86, 635-36).

9. The contract for the sale of Royal for a total price of $114,587.21, dated July 8, 1988, was entered between

Louis Ribaste and Robert and Beverly Heimann, and required periodic payments of $15,000. (CX 60).

10. Jeff Heimann and Joe Cali did not utilize any of their own funds in the purchase of Royal. (CX 17, p. 10).

11. On January 3, 1989, Jeff Heimann, Joe Cali, and Beverly Heimann applied for and received a Small Business Administration (SBA) loan in the amount of $125,000 in order to pay Mr. Ribaste in full. (CX 15; Tr. 586-587). The purpose for including Beverly Heimann as a partner on the loan application was to increase the chances of approval, since, as a woman, Mrs. Heimann was considered a "minority" by the SBA. (CX 17, p. 6; Tr. 386, 586-87).

12. In 1988, during its first year of operation, Royal reported gross revenues of $1,066,275 and a profit of $14,384. (RX 3).

13. When Royal was incorporated on November 21, 1988 Joe Cali, Beverly Heimann, and Jeff Heimann were identified as directors and equal shareholders, (RX 1, pp. 1-7, 32-33, 44-46), each receiving 10,000 shares of Royal common stock. (CX 13; RX 1). The minutes of the first meeting of directors on November 22, 1988, reflect that Joe Cali, Beverly Heimann, and Jeff Heimann were elected to serve as president, vice president, and secretary/treasurer, respectively. (RX 1, p. 35).

14. Beverly Heimann did not participate in the management or control of the business. (CX 17, p. 6). She did not receive compensation for her role as vice president of Royal. (RX 1, p. 36).

15. Royal noted in its 1991 tax return that the Beverly Heimann's shares were retired on or about January 2, 1991. (CX 19, p. 17). The "Shareholders's Share of Income, Credits, Deductions, etc." (Schedule K-1) reflect for the tax year 1991 that Beverly Heimann did not own any shares of Royal stock (CX 19, p. 14), and that Joe Cali and Jeff Heimann each owned 50% of Royal's outstanding stock. (CX 19, pp. 10, 12). The stock records of Royal do not reflect that the shares of Beverly Heimann were retired. (CX 13; RX 1, pp. 44-46).

16. The 1991 K-1 Schedules also reflect that Jeff Heimann and Joe Cali each received $24,196 in property distributions, while Beverly Heimann received $46,463 in property distributions. (CX 19, pp. 11, 13, 15).

17. While Robert Heimann was employed at UKC, he sold produce to Royal on an "open" basis, an industry practice whereby the price for produce a seller has shipped to a purchaser is not set until the purchaser receives the product. (Tr. 100-01, 117-19, 131-32, 636).

18. In May 1989, when UKC was in the process of changing ownership, Robert Heimann's employment contract at UKC expired and it was agreed with the new owner that his contract would not be renewed. (Tr. 380, 628-630). Robert Heimann became a consultant for Royal, with his fee, $10,000 per month, paid to Continental Oil Company ("Continental"), a venture he owned. (CX 18, p. 5; Tr. 593-95, 630).

19. Subsequent to the departure of Robert Heimann, UKC was found in a Consent Decision issued on June 11,

1990 (PACA Docket No. D-90-513), to have violated section 2(4) of the Act by issuing false and misleading documents to its suppliers to justify dumping and/or adjusting the price for fruits and vegetables that it received. (CX 64, p. 4-7). The decision included a finding that the false and misleading documents (inspection certificates) were "designed and prepared by Bob Heimann, who was the General Manager of United K.C., Inc., during the time in which the subject violations took place." (CX 64, p. 5) Although he testified at the hearing, Robert Heimann did not deny his alleged involvement in the false inspection certificate scheme at UKC.

20. After Robert Heimann joined the firm in May 1989, Royal's business increased substantially with the addition of tomato accounts and short business with grocery chain warehouses. (Tr. 609-10). During 1989, the year in which Robert Heimann was hired, Royal reported $3,430,287 in gross revenues and $70,049 in profits. (RX 5).

21. In December 1989, Royal purchased a new, larger location, at 303 Grand Avenue. (CX 61; RX 14, p. 164; Tr. 382-83, 589-92). The funds for the purchase price and improvements to the property were provided through another SBA loan in the amount of $525,000, secured by the assets of Royal and personal guaranties of Robert and Beverly Heimann, Joe Cali, and Jeff Heimann. (CX 16, 61).

22. The loan was also secured by a mortgage on the personal residence of Robert and Beverly Heimann. (CX 61, p. 8). The home was represented as having a value of

$350,000 and was subject to prior mortgages in the total amount of $210,000. (CX 61, pp. 8, 28).

23. The produce industry expertise and management experience of Robert Heimann were taken into consideration by the lenders in the decision to approve the loan. (CX 61, pp. 39-41).

24. Royal reported revenues of $6,941,626 and profits of $56,733 for 1990. (RX 6). In 1991, Royal reported sales of $10,674,024 and a $346,184 loss. (RX 7).

25. Robert Heimann was actively involved in the direction and management of Royal.

26. At the end of 1991, when Royal began to experience financial difficulty, Robert Heimann allowed Royal to reduce his consulting fee by 50% to $5,000 per month in order to help keep the business solvent. (CX 17, p. 54; Tr. 637-38).

27. In 1992, Royal experienced major inventory losses due to a cooler compressor failure. (CX 18, p. 9).

28. During the first three months of 1992, Royal received a series of at least 42 short-term, interest-free loans from Robert Heimann via checks from Continental Oil Company. (CX 21-23, 68; Tr. 596-600). During this three-month period, over 1.8 million dollars flowed from Continental to Royal. (CX 21-23). The purpose of the loans was to cover Royal's checking account at the local bank when Royal needed to pay its suppliers quickly. (CX 18, p. 9; Tr. 391, 596-99). When an out-of-town purchaser paid Royal for produce, Royal's bank would not credit the Royal account until three to ten days after the out-of-town check was deposited, whereas a check to Royal

from Continental, drawn on a local bank, was credited to Royal's account on same or next day after it was deposited. (Tr. 598-99). When Continental made these loans to Royal, Jeff Heimann would often give his father a Royal check in repayment for the loan on the same day; however, Robert Heimann would not deposit the Royal repayment in Continental's account for a few days in order to allow adequate time for the out-of-town checks from Royal's customers to be credited to Royal's account. (Tr. 599-600). Royal was not required to pay interest on any of the loans. (CX 18, p. 9; Tr. 600).

29. During early 1992, three checks totalling $30,000 were issued by Royal, made payable to Continental Oil, for which there appears no corresponding deposit in Royal's account. (CX 21-23, 68; Tr. 335-36).

30. Royal carried a $500,000 "key man" life insurance policy on Robert Heimann. (CX 17, p. 47). The company did not have life insurance for any other employee. (CX 17, p. 47).

31. On November 16, 1992, a Stipulation and Order for Preliminary Injunction was filed in the United States District Court for the Western District of Missouri, preserving Royal's PACA trust assets for the benefit of the plaintiff, Tom Lange Co., Inc., an unpaid produce vendor, and any other qualified PACA trust beneficiaries. (CX 7).

32. Counsel for the respective parties in the present matter stipulated at the hearing on March 22, 1994, that the amount left unpaid by Royal to the PACA trust creditors was $423,302.70. (Tr. 35-36).

33. On November 9, 1992, Jeffrey Heimann distributed to Royal employees an announcement which stated that the company would cease operations effective November 17, 1992. (CX 62). The announcement also stated that beginning November 18, 1992, "a new company, similar to Royal Fruit Co. will be leasing the building" and that the new company might possibly hire some of the Royal employees. (CX 62).

34. Midland Banana & Tomato Co., Inc., was incorporated on November 17, 1992, with an address of 303 Grand Avenue, Kansas City, Missouri 64106. (CX 27). Midland's PACA license application, dated November 23, 1992, identifies Susan Heimann as the sole officer, director, and shareholder. (CX 26, pp. 2-6). PACA License No. 930297 was issued to Midland on November 30, 1992, and was renewed in 1993. (CX 26, p. 1; Tr. 539).

35. Funds for the initial capitalization of Midland came in the form of loans from friends of Robert Heimann. (CX 18, p. 3). Susan Heimann testified that she also invested $500 in the firm. (Tr. 473).

36. Midland leased the facility at 303 Grand Avenue from Royal for $7,000 per month. (CX 17, p. 7). The lease was negotiated and executed by Jeff Heimann on behalf of Royal and Robert Heimann on behalf of Midland. (CX 17, p. 7, CX 31). On August 2, 1993, Midland contracted to purchase the Royal facility for $435,000, an amount supported by an appraisal which had been requested by Robert Heimann. (RX 14-15). The SBA loan, with a principal balance due of $426,420.88 (RX 15, p. 199), was assumed by Midland on August 19, 1993, under an agreement that provides for the continued liability of Robert

and Beverly Heimann, Jeff Heimann, and Joe Cali. (RX 17).

37. Midland retained approximately one-third of Royal's 35 employees. (CX 25, 37, 39).

38. Midland had the same telephone number and facsimile machine number as Royal. (CX 18, p. 12). Employees at Midland did not begin to answer the telephones as "Midland Banana & Tomato" until January 1, 1993. (CX 17, p. 20). At some point in 1993, the telephone and facsimile numbers were changed. (Tr. 500).

39. Midland utilized Royal's office equipment (CX 17, p. 20), Midland assumed the lease on Royal's tomato wrapping machines (CX 17, p. 20; RX 21), and used other Royal warehouse equipment such as jacks and two-wheelers. (CX 17, p. 20).

40. Midland and Royal had many of the same customers. (CX 17, p. 21; Tr. 380-82).

41. Robert Heimann served as the general manager of Midland, purchasing and selling virtually all of the produce (CX 18, pp. 3-4), checking files, paying bills, hiring and firing employees, arranging for transportation, maintaining inventory (CX 18, p. 4, 14), inspecting produce (CX 18, p. 1), and overseeing the day-to-day operations of the business. (CX 43).

42. Jeff Heimann was initially employed by Midland as a bookkeeper, then as a warehouse foreman, overseeing loads and supervising the packaging of tomatoes. (Tr. 487, 603-07). Jeff Heimann was no longer employed by Midland as of July 1993. (Tr. 607).

43. On several occasions, Midland loaned funds to Robert Heimann and Jeffrey Heimann. Each of the loans has been repaid with the exception of a $10,000 loan to Robert Heimann. (CX 49-50; Tr. 501-02, 608).

44. Prior to becoming the sole officer and director of Midland, Susan Heimann's experience in the produce industry was limited to her work at the City Market during weekends on a few occasions. (CX 17, p. 19; Tr. 474). In connection with her duties at Midland, Susan testified that she made up to three trips from school in Lawrence to visit the facility for a total of approximately 15 hours a week. (Tr. 485-86). She did not receive a salary for her services as president and sole director of Midland. (Tr. 467).

45. Susan Heimann is dependent upon her parents for financial support for college tuition and living expenses. (Tr. 469-71).

46. Susan Heimann testified that, when Midland was formed, she intended for Robert Heimann to manage the business so she would have a place of employment upon graduation from college. (Tr. 475, 503-04). The employment of Robert Heimann by Midland prevented her family from having to move to Florida, where her father had been offered a sales position. (CX 18, p. 1; Tr. 476, 504, 639-40).

47. Midland has discontinued operations with respect to the purchase and sale of produce. (Tr. 502).

Conclusions of Law

1. Respondents Royal Fruit Co., Inc., and Robert S. Heimann committed willful, flagrant and repeated violations of section 2(4) of the Act (7 U.S.C. § 499b(4)).

2. Respondents Midland Banana & Tomato Co., Inc., Susan E. Heimann, and Robert S. Heimann willfully violated section 8(c) of the Act (7 U.S.C. §499h(c)).

3. Jeffrey B. Heimann did not violate the Act in connection with the activities of Midland Banana & Tomato Co., Inc.

Pertinent Statutory Provisions

Section 2(4) of the PACA (7 U.S.C. § 499b(4)) provides:

It shall be unlawful in or in connection with any transaction in interstate or foreign commerce –

. . . .

(4) For any commission merchant, dealer, or broker to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer, or the purchase or sale of which in such commerce is negotiated by such broker; or to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had; or to fail,

without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction; or to fail to maintain the trust as required under Section 5(c) (7 U.S.C. § 499e(c));

Section 4(a) of the PACA (7 U.S.C. § 499d(a)) provides:

> (a) Whenever an applicant has paid the prescribed fee the Secretary, except as provided elsewhere in this Act, shall issue to such applicant a license, which shall entitle the licensee to do business as a commission merchant and/or dealer and/or broker unless and until it is suspended or revoked by the Secretary in accordance with the provisions of this Act, or is automatically suspended under section 7(d) of this Act (7 U.S.C. § 499g(d)), but said license shall automatically terminate on any anniversary date thereof unless the annual fee has been paid: *Provided,* That notice of the necessity of paying the annual fee shall be mailed at least thirty days before the anniversary date: *Provided, further,* That if the annual fee is not paid by the anniversary date the licensee may obtain a renewal of that license at any time within thirty days by paying the fee provided in section 3(b) of this Act (7 U.S.C. § 499c(b)), plus $5, which shall be deposited in the Perishable Agricultural Commodities Act fund provided for by section 3(b) of this Act (7 U.S.C. § 499c(b)): *And provided further,* That the license of any licensee shall terminate upon said licensee, or in case the licensee is a partnership, any partner, being discharged as a bankrupt, unless the Secretary finds upon examination of the circumstances of

such bankruptcy, which he shall examine if requested to do so by said licensee, that such circumstances do not warrant such termination.

. . . .

Section 8(a) of the PACA (7 U.S.C. § 499h(a)) provides:

> (a) Whenever (a) the Secretary determines, as provided in section 6 of this Act (7 U.S.C. § 499f) that any commission merchant, dealer, or broker has violated any of the provisions of section 2 of this act (7 U.S.C. § 499b), or (b) any commission merchant, dealer, or broker has been found guilty in a Federal court of having violated section 14(b) of this Act (7 U.S.C. § 499n(b)), the Secretary may publish the fact and circumstances of such violation and/or, by order, suspend the license of such offender for a period not to exceed ninety days, except that, if the violation is flagrant or repeated, the Secretary may, by order, revoke the license of the offender.

Section 8(c) of the PACA (7 U.S.C. § 499h(c)) provides:

> (c) If, after a license shall have been issued to an applicant, the Secretary believes that the license was obtained through a false and misleading statement in the application therefor or through a misrepresentation, concealment, or withholding of facts respecting any violation of the Act by any officer, agent, or employee, he may, after thirty days' notice and an opportunity for a hearing, revoke said license, whereupon no license shall be issued to said applicant or any applicant in which the person responsible for such false or misleading statement or

misrepresentation, concealment, or withholding of facts is financially interested, except under the conditions set forth in section 4(b) of this Act. (7 U.S.C. § 499d(b)).

Discussion

The PACA was enacted to regulate and control the handling of fresh fruits and vegetables. 71 CONG. REC. S2163 (May 29, 1929). Passage of the PACA was brought about in response to the severe losses that shippers and growers were suffering due to unfair practices on the part of commission merchants, dealers, and brokers. H.R. Rep. No. 1041, 71st Cong., 2d Sess. (1930).

The primary purpose of the PACA is to provide a practical remedy to small farmers and growers who are vulnerable to the sharp practices of financially irresponsible and unscrupulous brokers in perishable agricultural commodities. *O'Day v. George Arakelian Farms, Inc.*, 536 F.2d 856 (9th Cir. 1976); *Chidsey v. Guerin*, 443 F.2d 584 (6th Cir. 1971). "Accordingly, certain conduct by commission merchants, dealers, or brokers is declared to be unlawful." *O'Day, supra*, at 858. Enforcement is effectuated through a system of licensing with penalties for violations. H.R. Rep. No. 1041, 71st Cong., 2d. Sess. 3 (1930). *See also In re George Steinberg & Son, Inc.*, 32 Agric. Dec. 236 (1973), *aff'd sub nom., George Steinberg & Son, Inc. v. Butz*, 491 F.2d 988 (2d Cir.), *cert denied*, 419 U.S. 830 (1974).

By enacting the PACA, Congress also intended to establish bars to preclude all but financially responsible persons from engaging in the business subject to the Act.

Zwick v. Freeman, 373 F.2d 110, 117 (2d Cir.), *cert denied*, 389 U.S. 835 (1967); *Marvin Tragash Co. v. United States Dep't of Agric.*, 524 F.2d 1255, 1257 (5th Cir. 1975).

I. Royal Fruit Company, Inc.

The Complaint alleges that Royal failed to make full payment promptly of the agreed purchase prices for perishable agricultural commodities that it purchased, received and accepted in interstate and foreign commerce. In its Answer, Royal admitted to the unpaid debts as alleged. As more specifically set out in paragraph III of the Complaint, during the period July 1992 through November 1992, Royal failed to make full payment promptly to 21 sellers for 97 lots of perishable agricultural commodities in the total amount of $500,370.54. At the hearing, the parties stipulated that this amount had been reduced to $423,302.70, in light of a PACA trust distribution of over $77,000 to the creditors of Royal. (Tr. 36).

The failure of Royal to make full payment promptly constitutes flagrant and repeated violations of the Act. Violations are flagrant if the failures to pay promptly and in full are for amounts that are not *de minimis*. *In re Samuel S. Napolitano Produce, Inc.*, 52 Agric. Dec. 1607, 1612 (1993). Violations are repeated if there is more than a single failure to pay. *Id.* at 1611. Based upon the guidelines set forth above, it is clear that the actions of Royal, in failing to make full payment promptly to 21 sellers for 97 lots of produce totalling $500,370.54, are flagrant and repeated violations of section 2(4) of the Act. (7 U.S.C. § 499b(4)).

In addition, I conclude that the violations were willful. Under the Act, a violation is willful if, irrespective of evil motive or erroneous advice, a person intentionally does an act which is prohibited by a statute or if a person carelessly disregards the requirements of a statute. *In re H.M. Shield, Inc.*, 48 Agric. Dec. 573, 581 (1989), *aff'd per curiam*, 893 F.2d 347 (11th Cir. 1989) (unpublished). Over the course of several months, Royal continued to purchase produce in large quantities when it was unable to pay its suppliers; therefore, even under the stricter standard set forth in some circuits, *see, e.g., Capitol Packing Co. v. United States*, 350 F.2d 67, 78-79 (10th Cir. 1965), the violations would still be willful in view of Royal's blatant disregard of express regulations requiring prompt payment.

Respondents argue that Robert Heimann was merely a salesman for Royal and, as such, cannot be held individually accountable for the failures to pay promptly, especially since the corporate records of Royal identify Jeffrey Heimann, Joe Cali, and Beverly Heimann as the sole officers, directors, and shareholders of the firm. I do not agree.

It is possible that many of the factors which tie Robert Heimann to Royal, if taken individually, could be explained away. However, when the totality of the circumstances is considered, the evidence with regard to the central role played by Robert Heimann in the affairs of Royal points to a much more intimate relationship – beyond that which Respondent maintains existed. I conclude that, beginning with Royal's acquisition and continuing until its eventual demise, Robert Heimann was a

key figure in nearly every important aspect of the business.

Although the fact received relatively little attention at the hearing, I find it quite telling with respect to Robert Heimann's role at Royal that he executed (along with his wife, Beverly) the contract for the purchase of Royal from its original owner, Louis Ribaste. (CX 60, pp. 2-9). The explanation given for this arrangement was that Mr. Ribaste was confident that Robert Heimann, with his experience in the industry, would make good on his promise to pay, whereas Ribaste was unsure about Jeff Heimann and Joe Cali. (Tr. 231-32). Mr. Ribaste made his understanding of the transaction clear when he testified that "dollar-wise, I was looking to Bob Heimann for my $114,000, but Jeff [Heimann] and Joe [Cali] were operators" who would initially run the firm. (Tr. 231).

Respondents contend that Robert Heimann was merely a guarantor on the purchase of Royal and that Jeff and Joe were the true principals and owners. However, nothing in the contract for the sale of Royal indicates the existence of such an arrangement. (CX 60, p. 2-9).

Conspicuous by its absence is any proof in the record indicating that title to Royal ever passed from Robert Heimann to Jeffrey Heimann or Joe Cali. The document entered as CX 60, page 13, entitled "Ownership of Royal Fruit Company" does not change this assessment. The document, dated November 10, 1988, and signed by Robert Heimann, states in its entirety:

> Initially, Bob and Beverly Heimann negotiated the purchase of the business. When the deal was closed, immediately thereafter, Mr. Heimann

> directed any and all responsibilities related to the company to Joe Cali and Jeff Heimann. The resultant effect was that on July 8, 1988, the day the business commenced, Joe Cali, Jeff Heimann, and Beverly Heimann, were equal partners in the business.

Even if this self-serving document were taken as true on its face, it merely recites the same facts as stated above by Mr. Ribaste, i.e., that Robert and Beverly Heimann owned Royal, while Jeff Heimann and Joe Cali initially managed it. There is no other evidence in the record with respect to how Jeff Heimann and Joe Cali came to own Royal or what consideration Robert Heimann received in exchange for his ownership interest. Indeed, Jeff Heimann once acknowledged that he and Joe Cali did not utilize any of their own funds in the purchase of Royal. (CX 17, p. 10). Although the exhibits show that once Royal was incorporated, Jeff Heimann, Joe Cali, and Beverly Heimann each received one-third of the shares of the corporation, the question remains: how did they come to "own" Royal?

Royal applied for, and received, a $125,000 SBA-guaranteed loan in December 1988, for the purpose of paying the balance of the purchase price to Mr. Ribaste. (CX 61, pp. 2-5, 31-35). In addition to the assets of the business and personal guaranties of Jeff Heimann and Joe Cali, the loan was secured by a personal guaranty of Beverly Heimann. (CX 61, p. 4).

Beverly Heimann's actual participation, if any, in the operations at Royal was very limited. The Heimanns and Joe Cali acknowledged that the sole purpose of her presence as a "partner" on Royal's initial SBA loan was to assist in securing loan approval. (CX 17, p. 6; Tr. 386,

586-587). While some testimony indicated that she provided early bookkeeping assistance (Tr. 386), other evidence showed that she was "just a name" and "something that was just on a piece of paper." (CX 17, p. 6). She did not receive compensation for her role as vice president of Royal. (RX 1, p. 36).

Respondents point to the fact that Robert Heimann was still employed at UKC at the time he purchased Royal. However, Robert Heimann's relationship with Royal did not end when he purchased it. Although he was working for UKC at the time, Robert Heimann sold produce to Royal on an "open billing" basis. "Open billing" or "price after sale" occurs when the price for produce that a seller has shipped to a purchaser is not set until the purchaser receives the product. (Tr. 100-01, 117-19, 131-32). Robert Perryman, who purchased UKC in May 1989, testified that Robert Heimann's insistence on using "open billing" on sales to Royal was directly related to the departure of Mr. Heimann from UKC that month. (Tr. 118, 137). Mr. Perryman also testified that Royal was the only produce firm that Mr. Heimann sold to on an "open" basis. (Tr. 119). Moreover, Joe Cali testified that he "talked to Bob constantly, you know, about the buying of produce." (Tr. 572).

Robert Heimann's direct participation in the affairs of Royal began when his contract at UKC expired in May 1989. After a few weeks selling tomatoes in Arkansas, he joined his son and Joe Cali at Royal. He received the same salary at Royal as he had at UKC – $10,000 per month, paid in the form of "consulting fees" to Continental Oil Company a venture he owned. (CX 18, p. 5; Tr. 593-95, 630). Soon after Robert Heimann joined the firm, Royal

experienced rapid growth in both its sales and its physical facilities. During its first year in operation – 1988, while Robert Heimann was still employed at UKC, Royal reported sales of $1,066,275 and profits of $14,384. (RX 3). In 1989, the year Robert Heimann began selling at Royal, sales of $3,430,287 and profits of $70,049 were reported. (RX 5).

Robert Heimann was also instrumental in securing adequate financing for Royal's expanding operations. In August 1989, Royal applied for, and eventually received, a $525,000 SBA-guaranteed loan for the purpose of acquiring and improving a large warehouse facility at 303 Grand Avenue in Kansas City. (CX 16, 61). An examination of the loan application documents reveals that the lenders considered the management expertise and the personal assets of Robert Heimann in the decision to approve the loan. (CX 61, pp. 39-41). In the SBA document entitled "Lender Application for Guaranty or Participation," the analysis of Royal included the following comment with regard to "Management skill of the applicant": "Bob has been in this business for over 30 years as the history indicates. In addition he has made this company very successful and profitable in the last year." (CX 61, pp. 39-40). Another application form contains the following assessment of "management capabilities": "Bank considers management to be excellent. Robert Heimann has been in this business for 30 years." (CX 61, p. 41). These documents make it clear that, at least from the lender's standpoint, Robert Heimann was actively involved in the direction and management of Royal, and,

as such, he was an integral part of the lender's assessment of the ability of Royal to generate the revenue necessary to service the additional debt.

It is of even greater significance that this $525,000 loan was in part secured by a third mortgage on real estate located at 10303 Howe Lane, Leawood, Kansas – the personal residence of Robert and Beverly Heimann. (CX 61, pp. 8, 28). One who is a mere employee or consultant does not normally risk losing his home in order to finance his employer's capital improvements.

Robert Heimann was also a dominant figure with respect to produce sales and purchases at Royal. He was personally responsible for the purchase, sale, and transportation of a majority of the firm's produce transactions. (CX 18, p. 8; Tr. 384, 389). Prior to his arrival at Royal, the firm was primarily a "banana house," selling bananas to local markets. (Tr. 608-09). After Robert joined Royal full-time in May, the business expanded to tomatoes and other fruit, as well as "shorts," spot sales made to grocery warehouses to make up for unexpected inventory deficiencies. (Tr. 609-11). Several witnesses testified that, in doing business with Royal, it was their impression that Robert was the individual in charge of operations at the firm. (Tr. 66-67, 84, 190-91, 200-01, 215-17, 354-56, 363-64). Respondents maintain that his sole functions at Royal were to negotiate the purchase and sale of produce and arrange for its transportation. However, at least two witnesses experienced in the produce industry testified that those activities comprise the very essence of the business. (Tr. 190, 221). Further evidence of Robert Heimann's central role in the success or failure of the enterprise is illustrated by Jeff's acknowledgement that Royal carried

a $500,000 "key man" life insurance policy on Robert Heimann and no other Royal employee. (CX 17, p. 47).

Robert Heimann also determined when Royal would pay creditors for produce and whether purchasers were due an adjustment in the price of produce sold to them. (Tr. 91-94, 191, 194, 204-07, 215-16, 354). One witness testified that, when he was unsuccessful in his attempts to collect payment from Jeff Heimann for produce sold to Royal, he would speak with Robert Heimann, who regularly produced a payment for him. (Tr. 93). Another witness testified that, during a dispute which arose regarding lettuce he had purchased from Jeff Heimann, Jeff initially indicated his willingness to adjust the price, but, after Jeff consulted with Robert Heimann, Jeff told the witness that "he couldn't do it because he had orders from Bob that the bill stands as is." (Tr. 367). When Royal became delinquent on several freight bills, one creditor approached Robert Heimann with an offer to haul produce on a COD basis in exchange for payments on Royal's outstanding inv[redacted]. (Tr. 358). Although Jeff Heimann was present when the offer was made, it is clear from this testimony that Robert Heimann was the individual responsible for making the decision whether to accept the offer on behalf of Royal. (Tr. 363-64).

There is evidence that distributions of Royal income were made to Robert Heimann and Beverly Heimann. During 1992, three Royal checks totalling $30,000 were made payable to Continental Oil with no corresponding deposit in Royal's account. (CX 21-23, 68; Tr. 335-36). Moreover, the $46,463 property distribution to Beverly Heimann in 1991 appears to be inconsistent with the purported retirement of her shares, since it was reported

that she did not own any Royal stock during the 1991 tax year. (CX 19, p. 14).

When Royal began to experience financial difficulties, Robert Heimann attempted to bail the firm out. He reduced his consulting fee by 50%, down to $5,000 per month [and became a "salaried employee."] (Tr. 637-38). Also, during early 1992, Robert Heimann, through Continental Oil, made a series of at least 42 short-term loans to Royal to cover Royal's receivables. (CX 21-23; Tr. 596-600). The single largest of these loans was $87,500, with the average loan amount being slightly over $43,000. (CX 21-23). No interest was charged for Royal's use of the funds. (Tr. 391, 600). It appears from the evidence submitted that the great majority of these loans was repaid within a matter of days. (CX 21-23; Tr. 599-600).

Complainant's counsel makes much of these loans, arguing that they are evidence of a "check kiting scheme." This characterization is unwarranted and completely unsupported by the evidence. Although the loans may not represent sound business practices, there is no evidence in the record which would tend to show that Respondents generated a false float through a check kiting scheme. In order to prove that Respondents were kiting checks, Complainant would need to show that Respondents' banks were put at risk by the absence of sufficient funds in the accounts, i.e., that the funds in Continental Oil's account were not sufficient to cover the checks it was writing to Royal, and vice versa. *See, e.g., In re Blackfoot Livestock Commission Co.*, 45 Agric. Dec. 590, 606-09, *aff'd*, 810 F.2d 916 (9th Cir. 1987). No such evidence was offered by Complainant. Therefore, I find

absolutely no merit in Complainant's characterization of those transactions as "kiting."

Instead, what this series of transactions represents is further evidence that Robert Heimann was intimately involved in maintaining the financial welfare of Royal. Over a three-month period he made nearly $2 million in funds available to Royal, all of it interest-free. As with the mortgage on his residence to cover the half-million dollar SBA loan, this massive financial commitment is not the sort of practice that a mere employee would contemplate and even appears to be quite extreme for a father's assistance to one of his children. However, it is precisely what an entrepreneur might risk in order to keep his ailing business afloat.

Robert Heimann had good reason for avoiding the appearance of holding a responsible position at Royal. The PACA investigation, his departure from UKC, and the subsequent Consent Decision implicating him in a scheme involving a false inspection certificate at UKC would have put PACA officials ill at ease had they been aware of his connection with Royal. (Tr. 523-24, 526-27). Although he testified at the hearing, Mr. Heimann made no attempt to deny his participation in the alleged falsification of the inspection certificate.

As a general rule, a corporation is treated as a separate legal entity, "but, when the notion of legal entity is used to defeat public convenience, justify wrong, protect fraud, or defend crime, the law will regard the corporation as an association of persons." *Capital Tel. Co., Inc. v. FCC*, 498 F.2d 734, 738 (D.C. Cir. 1974), quoting *Mansfield Journal Co. (FM) v. FCC*, 180 F.2d 28, 37 (D.C. Cir. 1950). In

the context of the Department's regulatory programs, the United States Court of Appeals for the Third Circuit concluded as follows:

> Clearly, an order limited in its application only to the corporate petitioners probably would prove futile as the corporations could be dissolved and the individual petitioners could then, under the cloak of new corporations, engage in the proscribed activities and thereby frustrate the purposes of the Act. The law is well settled that the 'corporate entity may be disregarded when the failure to do so would enable the corporate device to be used to circumvent a statute.'

Bruhn's Freezer Meats v. United States Dep't of Agriculture, 438 F.2d 1332, 1343 (3d Cir. 1971) (citations omitted). Moreover,

> [w]hen at some innocent party's expense, the corporation is converted into such an instrumentality, 'the courts will not permit themselves to be blinded or deceived by mere forms or law but, regardless of fictions, will deal with the substance of the transaction involved as if the corporate agency did not exist and as the justice of the case may require.'

Quinn v. Butz, 510 F.2d 743, 758 (2nd Cir. 1975), quoting *Chicago, M. & St. P. Ry. v. Minneapolis Civic & Commerce Ass'n*, 247 U.S. 490, 501 (1918).

In determining whether an order should be made applicable to an individual respondent, the Department examines the totality of the circumstances surrounding the violation rather than the form of the business entity

involved in order to effectuate the purposes of the statutes it administers. "The Department is properly concerned with who is in control of the business entity when any violations of Federal statutes (and/or USDA regulations emanating therefrom) occur," and the *alter ego* theory is applied "so that any imposed sanction may also run against the individual(s) actually responsible for the corporate misbehavior, if appropriate in the context of the case." *In re Lloyd Myers Co., Inc.*, 51 Agric. Dec. 747, 767 (1992), *aff'd*, 15 F.3d 1086 (9th Cir. 1994) (Table).

Even if proof existed with respect to a legitimate transfer of ownership from Robert Heimann to Jeff Heimann and Joe Cali, the *alter ego* doctrine would still apply in this case. The Judicial Officer made use of the *alter ego* theory to find a similarly situated individual responsible for violations of the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) in *In re MCM Livestock, Inc.*, 39 Agric. Dec. 893 (1980). In that case, the general manager responsible for the direction, management and control of a stockyard did not own stock in the respondent corporation; however, his wife was one-third owner. The Judicial Officer concluded that the *alter ego* doctrine applied to the manager because the violations represented "an established course of willful misconduct on his part which cannot be effectively deterred if he is not made personally subject to the order, and he therefore will be." *Id.* at 901. The same reasoning applies to this matter, where Mr. Heimann's participation in the produce industry cannot be effectively controlled unless he is held personally responsible for the violations.

I, therefore, conclude that Royal was the *alter ego* of Robert Heimann. Accordingly, he must be held individually accountable for the willful, flagrant and repeated violations of section 2(4) of the Act (7 U.S.C. § 499b(4)) found to have been committed by Royal under his direction and control. In reaching this conclusion, I have considered, inter alia, the lack of evidence with regard to a legitimate transfer of Royal ownership after the purchase of Royal by Robert Heimann, the extensive financial assistance provided to Royal by Mr. Heimann, the extent to which Mr. Heimann directed and managed the operations of Royal, and the distributions of Royal income and property to Mr. and Mrs. Heimann.

The PACA license issued to Royal was terminated when the annual renewal fee was not paid. Accordingly, the appropriate sanction with respect to Royal and Robert Heimann is publication of the facts and circumstances of the violation. (Tr. 535). This is in accord with the sanction policy announced by the Judicial officer in *In re S.S. Farms Linn County, Inc.* (Decision as to James Joseph Hickey and Shannon Hansen), 50 Agric. Dec. 476, 497 (1991), *aff'd*, 991 F.2d 803 (9th Cir. 1993) (Table).

II. Midland Banana & Tomato Co., Inc.

The Complaint alleges that Midland wrongfully obtained a PACA license by submitting an application which contained false and misleading statements in violation of section 8(c) of the Act. (7 U.S.C. § 499h(c)). Complainant contends that Respondent Susan E. Heimann, who was listed in the application as the sole shareholder,

officer and director of Midland, failed to reveal that Midland was a successor corporation to Royal and concealed the true roles of her father, Robert Heimann, and brother, Jeff Heimann, in the management of Midland. Complainant also alleges that Susan Heimann failed to provide new information to update her responses with respect to questions on the application concerning reparation awards against Royal.

Susan Heimann personally provided the information necessary to complete Midland's Application for License (Form FV-211), which was submitted on November 23, 1992. (CX 26). Based on the answers provided in the application, Midland was issued PACA License No. 930297, which was last renewed in November 1993. Susan Heimann testified that, because she had prior commitments at school in Lawrence, Kansas, she did not personally fill out the application form. (Tr. 492-93). Susan testified that instead, a Midland employee, Karen Ward, read the application to her over the telephone and that Ms. Ward completed the application as Susan provided the responses (Tr. 477) and signed Susan's name on the application. (Tr. 493). When initially questioned about the application by a USDA investigator, Susan maintained that she had personally completed and signed the form. (CX 43; Tr. 492). However, Susan subsequently acknowledged that the form had been completed and signed by Ms. Ward on her behalf and provided the investigator with an "Agency Ratification," dated June 17, 1993, authorizing Ms. Ward's actions. (CX 42, p. 2; Tr. 492-93). The information contained on the Midland license application is false and misleading in that it fails to reveal material facts with respect to the management and prior

history of the business. Question 11 of the Application states: "Does the applicant firm succeed another firm?" (CX 26). The application submitted by Midland contains a "no" answer in response to this question. The evidence submitted in this case clearly indicates that, from the time it was formed, Midland was a successor to the then-defunct Royal. I agree with Complainant's contention that Midland was merely a scaled-down version of Royal.

Midland continued the operations of Royal by hardly missing a day of business. When Royal ceased operations on November 17, 1992, Jeffrey Heimann distributed an announcement that "a new company, similar to Royal Fruit Co. will be leasing the building as of November 18, 1992 and perhaps they will be able to hire you." (CX 62). It is more than a mere coincidence that Jeff Heimann's optimistic prediction proved to be accurate – although Midland was not able to keep every former Royal employee on the payroll, at least one-third were employed at Midland. (CX 25, 37, 39).

With the exception of the names on the PACA license applications, there is little to distinguish Royal and Midland. Midland operated out of Royal's facility at 303 Grand Avenue in Kansas City, using the same telephone and facsimile numbers. (CX 18, p. 12) Even though Midland commenced business in November, Midland employees did not begin answering the telephones as "Midland Banana and Tomato" until January 1. (CX 17, p. 20). Midland utilized Royal's office equipment, assumed the lease on Royal's tomato wrapping machine and used other Royal warehouse equipment such as jacks and two-wheelers. (CX 17, p. 20; RX 21). Midland's customers

were the same as Royal's: government purchases, Associated Grocers and Fleming Foods continued to comprise the bulk of sales. (CX 17, p. 21; Tr. 380-82). Indeed, the testimony of several experienced members of the produce industry who dealt with both Royal and Midland indicated that they perceived no real difference between the two entities. (Tr. 71, 187, 207-08).

Respondent argues that *In re Skyline Foods, Inc.*, 52 Agric. Dec. 1598 (1993), applies to Midland and requires a finding that Midland was not a successor to Royal. I do not agree. In Skyline, the individual identified as the corporate president and shareholder of the alleged successor firm had more than twenty years' business experience and had contributed $100,000 of his personal funds to the firm's operating capital. *Id.* at 1602, 1604. In the instant case, Susan Heimann, the sole shareholder, officer and director of Midland had no prior business experience before the corporation was formed and she contributed only a very small fraction of funds to the firm's initial capitalization. Moreover, the evidence in Skyline indicated that the president of that company actually participated in the management and exercised control of the enterprise without the assistance of those involved in the previous company. *Id.* at 1604-05. In the present matter, Susan Heimann had very little, if any, real authority over the operations of Midland. Instead, Royal and Midland both operated under the direction and management of the same individual – Robert Heimann.

Based on the foregoing, I conclude that Midland succeeded Royal as a mere continuation or reincarnation of the former business because there was a substantial continuity of identity in the business enterprise before and

after the change. It operated out of Royal's facility under the same management, used Royal's equipment, kept many of Royal's employees, and served the same customers who considered it to be essentially the same company as Royal. Therefore, the answer to Question 11 of Midland's PACA the application is false and misleading.

I also find Midland's application to be misleading on its face because it concealed the identity of the true principal of the firm. Although Susan Heimann was listed on the Midland application as the firm's sole shareholder, officer and director, it is clear that she was merely a figurehead who served to shield her father, the true owner and principal of Midland. It appears that Susan participated in this ruse out of loyalty to her family. She testified that, if Midland had not been formed, her parents would be required to sell their home and move to Florida and her brother would be out of work. (Tr. 476, 504). Testimony of Robert Heimann supports this conclusion. (Tr. 639-640; CX 18, p. 1). While I may personally sympathize with her motives, her actions were clearly designed to circumvent the provisions of the PACA and cannot be ignored.

Susan Heimann's actual participation in the affairs of Midland and her knowledge with regard to the produce industry are both very limited. She is a busy, full-time college student at the University of Kansas, in Lawrence, Kansas. (Tr. 464). With the exception of occasional weekend work at fruit stands, she has no prior experience in the produce industry. (CX 17, p. 19; Tr. 474). Susan testified that she visited Midland up to three times a week for a total of approximately 15 hours a week in connection

with her duties as sole officer and director of the enterprise. (Tr. 485-86). Although I agree with Respondents' contention that a shareholder need not be actively involved in the management of a business she owns, the same cannot be said for one who is also identified as the sole officer and director of a corporation. There is no evidence that Susan received any compensation for serving as the sole officer and director of Midland; nor does she appear on the Midland's employee list. (CX 37, 39). Moreover, there is no evidence that she received distributions of Midland earnings as a shareholder.

Susan claims to have contributed $500 to the initial capitalization of Midland. (Tr. 473). The remainder, $30,000, came in the form of unsecured loans from Robert Heimann's friends. (CX 18, p. 3). Susan acknowledged that she would have been unable to borrow such a large amount of money without her father. (Tr. 482, 498-99).

I conclude that Robert Heimann was the true principal at Midland, actively involved in the direction and control of virtually every significant aspect of the firm's operations. As general manager of Midland, Robert Heimann's duty was to run the business. His responsibilities included purchasing and selling virtually all of the produce (CX 18, pp. 3-4), checking files, paying bills, hiring and firing employees, arranging for transportation, maintaining inventory (CX 18, p. 4, 14), inspecting produce (CX 18, p. 1), and overseeing the day-to-day operations of the business. (CX 43). He acknowledged that "I've got to worry about everything . . . I have the responsibility of everything on my back." (CX 18, p. 14). This statement reveals the true nature of Robert Heimann's role at Midland.

Strikingly similar factual circumstances have arisen in proceedings in previous cases brought under section 8(c) of the Act. In *In re Perfect Potato Packers, Inc.*, 45 Agric. Dec. 338 (1986), Weller, an individual involved with produce firms that had pending reparation proceedings "seized upon the idea of forming a new corporation . . . using some of his loyal and dedicated employees as the incorporators, directors, officers and stockholders through which he could continue potato operations and insulate some funds from growing financial delinquencies." *Id.* at 340. The new corporation submitted a license application which made no mention of Weller's relationship to the applicant. The application, "on its face, appeared to be proper. There was no apparent reason to raise suspicions or doubts. It was approved and a license was issued." *Id.* The new corporation used Weller's building, equipment, employees and telephones. *Id.* 343-44. The Court concluded that the application was misleading because it "failed to disclose in any way the dominating and controlling interest of Weller. Weller, without question, was the primary beneficiary of Respondent's existence and affairs, and dominated its every move." *Id.* at 350. *See also In re George Townsend*, 35 Agric. Dec. 1604, 1615 (1976) (A disciplinary proceeding arising under the Packers and Stockyards Act, wherein the court concluded, "the corporation was formed under the dark shadow of the [previous entity's] legal difficulties then pending and well known. It is thus concluded that the corporation was formed at that time for the major purpose of evading and circumventing the impact of any potential sanction of the continuing business operations of the former [entity]."). I, therefore, conclude that the

application submitted by Midland contains, through a combination of omission and concealment, misleading statements with respect to the ownership and management of the enterprise.

The cases arising under section 8(c) of the PACA indicate the Department's willingness to hold to a strict interpretation of its requirements. Intent is not a part of the offense. *In In re Perfect Potato Packers, Inc.*, 45 Agric. Dec. 338, 353-54 (1986), the Judicial Officer stated as follows: "Respondent argues that there was no intent to defraud, but intent to defraud is not at issue here. Respondent's license may be revoked if (the license was obtained through a false or misleading statement in the application therefor' (7 U.S.C. § 499h(c))." *In In re Lloyd Myers Co., Inc.*, 51 Agric. Dec. 747, 767 (1992), *aff'd*, 15 F.3d 1086 (9th Cir. 1994) (Table), the Judicial Officer affirmed the revocation of a PACA license because, *inter alia*, the application represented that the applicant was a corporation when in fact the corporate charter had been temporarily suspended. Regardless of the fact that the corporate charter was subsequently "revived," the Judicial Officer held that the license application was false and misleading, and concluded that the violation "was discernable from the application document, itself; and whether the facts thereon are false or misleading *to the PACA examiners*" determined whether the application was in violation of the Act. *Id.* at 760 (emphasis in original). It is less clear whether Midland's "no" answers in response to Question 10 are false. Question 10 of the Application for License states as follows:

> Has any person employed by the applicant been the individual owner, partner, officer, director,

or holder of more than 10% of the outstanding stock of a firm, association or corporation:

a. Whose license is under suspension or has been revoked?

b. Who has been found to have committed any flagrant or repeated violations of the Act?

c. Against whom there is an unpaid reparation award?

Robert Heimann acknowledged that his license had been "pulled" in connection with his involvement with Gilbert Corporation's failure to pay reparation orders in the mid-1970's. (CX 18, p. 6). Aside from this ambiguous answer, there is no reliable evidence which would indicate the status of the Gilbert license, i.e., whether it was temporarily suspended or permanently revoked in connection with the unpaid reparation orders. Complainant further maintains that the Gilbert license was under an ongoing suspension pursuant to 7 U.S.C. § 499m(b) for failure to submit documents in connection with the foregoing reparation claims. However, no documentary evidence exists which would substantiate this claim. (Tr. 550). Furthermore, it does not appear from the testimony of Complainant's witness that he was personally involved in the Gilbert investigation and I do not accept his assertion that he serves as the "institutional memory" with respect to such matters. (Tr. 551). Finally, Complainant contends that, when Susan submitted the "Agency Ratification" in June 1993 (CX 42), the answer to Question 10 should have been updated with respect to Jeffrey Heimann's relationship with Royal. However, the record

indicates that the PACA branch was already in communication with Midland regarding Jeff Heimann's employment status. (CX 41). Therefore, I do not make a finding as to whether Midland's application contained a false statement in connection with Question 10.

The *alter ego* analysis with respect to Royal, *supra*, applies equally here to Robert Heimann's relationship with Midland. On the basis of his obvious domination and control over the affairs of the corporation, I conclude that Robert Heimann was beneficial owner of 100% of the Midland stock ostensibly owned by his daughter, Susan Heimann. Therefore, the Order shall be made to apply to him individually.

I also conclude that Susan Heimann violated the Act through her willful participation in the scheme to circumvent the PACA by submitting a PACA application which contained false and misleading statements. Although she appears to have been primarily motivated by loyalty to her family, her actions were nonetheless designed to circumvent the provisions of the PACA; therefore, she also will be made part of the Order.

Complainant has failed to meet its burden of proof with respect to the allegations relating to Jeffrey Heimann. Although Jeff Heimann was employed in various capacities at Midland, I conclude that the evidence is insufficient to meet the requirements discussed, *supra*, necessary for a finding that Midland was his *alter ego*, as Complainant alleges. Regardless of this finding, because he is an individual identified as being a shareholder, officer and director of Royal, his future employment in the industry will, of course, be subject to the employment

restrictions for PACA applicants and licensees contained in sections 4(b) and 8(b) of the Act (7 U.S.C. §§ 499d(b), 499h(b)).

Complainant recommends the revocation of Midland's license as a sanction for the above violations, which is what the Act requires. 7 U.S.C. § 499h(c). Such a sanction is appropriate and is in accordance with the sanction policy announced by the Judicial officer in *In re S.S. Farms Linn County, Inc.* (Decision as to James Joseph Hickey and Shannon Hansen), 50 Agric. Dec. 476, 497 (1991), *aff'd*, 991 F.2d 803 (9th Cir. 1993) (Table). Therefore, an Order will be entered revoking Midland's license.

Order

A finding is hereby made that Respondents Royal Fruit Co., Inc., and Robert S. Heimann, have committed willful, flagrant and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)), and such finding shall be published.

Respondents Midland Banana & Tomato, Inc., Susan E. Heimann, and Robert S. Heimann, have violated section 8(c) of the PACA (7 U.S.C. § 499h(c), and the license of Midland Banana & Tomato, Inc., is hereby revoked.

The Complaint with respect to Jeffrey B. Heimann is hereby dismissed.

This Order shall take effect 14 days after this Decision becomes final. Pursuant to the Rules of Practice, this Decision will become final without further proceedings 35 days after service unless appealed to the Secretary by a party to the proceeding within 30 days after service as

provided in section 1.145 of the Rules of Practice (7 C.F.R. § 1.145)

/s/ Edwin S. Bernstein
EDWIN S. BERNSTEIN
Administrative Law Judge

July 26, 1994

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:	)	PACA Docket No.
Royal Fruit Co., Inc., and Robert S. Heimann	)	0-93-5?
	)	
Respondents	)	Complaint

There is reason to believe that the respondents named herein have wilfully violated the Perishable Agricultural Commodities Act, 1930, as amended, (7 U.S.C. § 499a *et seq.;* hereinafter "PACA"), and the Regulations issued thereunder (7 C.F.R. Part 46; hereinafter "regulations"). Therefore the Director, Fruit and Vegetable Division, Agricultural Marketing Service, pursuant to the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. § 1.130 *et seq.*, hereinafter "Rules of Practice"), initiates this disciplinary proceeding against Royal Fruit Co., Inc., and Robert S. Heimann.

I

Section 2(4) of the PACA (7 U.S.C. § 499b(4)) provides in part:

> It shall be unlawful in or in connection with any transaction in interstate or foreign commerce –
>
> * * *
>
> (4) For any commission merchant, dealer, or broker to make, for a fraudulent purpose, any false or misleading statement in connection with

any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer, or the purchase or sale of which in such commerce is negotiated by such broker; or to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had; or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction; or to fail to maintain the trust as required under Section 5(c).

II

(a) Royal Fruit Co., Inc., (hereinafter "respondent Royal Fruit Co., Inc.") is a corporation organized and existing under the laws of the State of Missouri. Its business mailing address at all times material herein was 303 Grand Avenue, Kansas City, Missouri 64106.

(b) PACA License number 900296 was issued to respondent Royal Fruit Co., Inc., December 1, 1989. This license terminated on December 1, 1992, pursuant to Section 4(a) of the PACA (7 U.S.C. § 499d(a)), when respondent Royal Fruit Co., Inc., failed to pay the required annual renewal fee.

(c) Robert S. Heimann (hereinafter respondent Robert S. Heimann) is an individual whose address is 10303 Howe Lane, Leadwood, Kansas 66206.

(d) Respondent Robert S. Heimann at all times material herein was the actual owner of a one-third interest in respondent Royal Fruit Co., Inc.; and in combination with his son Jeffrey B. Heimann and Joseph Cali, was responsible for the management, direction and control of respondent Royal Fruit Co., Inc., and an *alter ego* of respondent Royal Fruit Co., Inc.

(e) Respondent Robert S. Heimann at all times material herein concealed his actual one-third interest in respondent Royal Fruit Co., Inc. Initially, respondent Robert S. Heimann had his wife, Beverly M. Heimann, hold the position of vice-president, director and one-third stockholder while he shared actual control of respondent Royal Fruit Co., Inc., equally with Jeffrey B. Heimann and Joseph Cali. Following the purported resignation and termination of stock ownership by his wife on or about December 31, 1991, respondent Robert S. Heimann continued to exercise his actual one-third interest in respondent Royal Fruit Co., Inc., until it was forced to cease purchasing perishable agricultural commodities in commerce during November 1992.

III

Respondent Royal Fruit Co., Inc., during the period July 1992, through November 1992, on or about the dates and in the transactions set forth below, failed to make full payment promptly to 20 sellers of the agreed purchase prices in the total amount of $500,370.54 for 97 lots of perishable agricultural commodities, which it purchased, received, and accepted in interstate and foreign commerce under the management, direction and control of

respondent Robert S. Heimann, Joseph Cali and Jeffrey B. Heimann. The details of the amounts that remain past due and unpaid are set forth below:

TRANS NO	SELLER & ADDRESS	QUANTITY & COMMODITY	DATE ACCEPTED	DATE PAYMENT DUE	AGREED PURCHASE PRICE
1	Crown Brokerage, Inc.	90 ctns nectarines	07/02/92	08/01/92	$900.00
2	Kansas City, MO	260 ctns mxd. veg.	10/01/92	10/31/92	372.50
3	Origin: TX, GA, MI, CA	303 ctns mxd. veg.	10/05/92	11/04/92	227.25adj
4		160 ctns cucumbers	10/09/92	11/18/92	160.00
5		210 ctns cucumbers	10/22/92	11/21/92	195.00
		Amount Past Due and Unpaid			**$1,854.75**
6	Di Mare Johns Island, Inc.	1600 ctns tomatoes	07/07/92	07/27/92	$8,743.50
7	Johns Island, SC	1600 ctns tomatoes	07/13/92	07/27/92	9,143.50
8		1600 ctns tomatoes	07/16/92	07/24/92	6,743.50
		Amount Past Due and Unpaid			**$24,630.50**
9	Six L's Packing Co., Inc. Immokalee, FL	1600 ctns tomatoes	07/14/92	07/24/92	$9,303.50
		Amount Past Due and Unpaid			**$9,303.50**

Giumarra Vineyards Corp.	900 lugs grapes	07/18/92	08/08/92	$10,035.00
Bakersfield, CA	900 lugs grapes	07/22/92	08/12/92	9,608.50
	1350 lugs grapes	07/26/92	08/16/92	13,972.50
	540 lugs grapes	07/31/92	08/21/92	4,401.00
	1080 lugs grapes	08/03/92	08/24/92	11,345.50
	90 lugs grapes	08/07/92	08/28/92	913.50
	1800 lugs grapes	08/30/92	09/20/92	5,473.00
	Amount Past Due and Unpaid			**$55,749.00**

Tom Lange Co.,, Inc.	38720 lbs watermelons	08/03/92	09/01/92	$237.90bal
St. Louis, MO	98 ctns apples	08/16/92	09/13/92	639.30
Origin: WA, IN, CA, VA, CO,	1600 ctns tomatoes	08/19/92	09/16/92	4,983.50
NJ, TX, TN, OR, IL, FL	1600 ctns tomatoes	09/10/92	10/02/92	11,223.50
	784 ctns cantaloupes	09/10/92	10/09/92	7,259.07
	240 ctns peaches	09/11/92	10/09/92	2,944.80
	800 ctns mxd. veg.	09/11/92	10/08/92	8,285.50
	350 ctns oranges	09/12/92	10/09/92	1,832.50
	10090 lbs watermelons	09/13/92	10/12/92	857.65
	1600 ctns tomatoes	09/13/92	10/11/92	11,303.50
	480 lugs grapes	09/14/92	10/11/92	4,895.50
	378 ctns grapefruits	09/14/92	10/10/92	2,748.60
	515 ctns mxd. frt. & veg.	09/14/92	10/11/92	3,510.25
	616 ctns mxd. frt.	09/17/92	10/14/92	8,736.47

TRANS NO	SELLER & ADDRESS	QUANTITY & COMMODITY	DATE ACCEPTED	DATE PAYMENT DUE	AGREED PURCHASE PRICE
31	Tom Lange Co., Inc.	504 ctns mxd. frt. & veg.	09/17/92	10/14/92	4,624.80
32	St. Louis, MO	707 ctns mxd. frt.	09/18/92	10/12/92	5,934.40
33	(cont.)	693 ctns mxd. veg.	09/21/92	10/18/92	4,329.15
34		490 ctns apples	09/21/92	10/16/92	6,125.00
35		1600 ctns tomatoes	09/24/92	10/15/92	11,223.50
36		1600 ctns tomatoes	09/26/92	10/17/92	9,623.50
37		338 ctns mxd. veg.	09/28/92	10/25/92	3,117.90
38		1680 ctns tomatoes	09/27/92	10/25/92	8,507.50
39		1600 ctns tomatoes	09/27/92	10/18/92	9,623.50
40		450 ctns oranges	09/28/92	10/25/92	2,250.00
41		35380 lbs pumpkins	09/28/92	10/28/92	1,945.90
42		45910 lbs pupmkins	10/01/92	10/30/92	3,328.48
43		780 ctns mxd. frt. & veg.	10/04/92	10/31/92	7,506.50
44		1672 flats tomatoes	10/04/92	10/31/92	5,123.10
45		216 ctns mxd. frt.	10/06/92	11/02/92	2,553.60
46		41560 lbs pumpkins	10/07/92	11/05/92	3,220.90
47		330 ctns grapefruit	10/09/92	11/04/92	3,696.00
48		1310 ctns mxd. frt.	10/10/92	11/07/92	11,411.00
49		1078 ctns apples	10/11/92	11/07/92	7,546.00
50		1029 ctns apples	10/13/92	11/09/92	7,203.00
51		1600 ctns tomatoes	10/14/92	11/06/92	8,823.50
52		466 ctns mxd. veg.	10/15/92	11/11/92	3,016.08
53		1600 ctns tomatoes	10/18/92	11/12/92	25,623.50
54		294 ctns pears	10/19/92	11/15/92	3,748.50
		Balance Past Due and Unpaid			**$229,563.35**
55	Exeter Produce & Storage Co., LTD. Exeter, Ontario, Canada	230 ctns mxd. veg.	08/12/92	08/25/92	$1,780.00
		Amount Past Due and Unpaid			**$1,780.00**
56	Maat & Guikema Produce	445 ctns mxd. veg.	08/16/92	09/05/92	$2,927.50
57	Zeeland, MI	550 ctns mxd. veg.	09/10/92	09/29/92	3,860.00
58		90 ctns cucumbers	09/12/92	10/01/92	135.00
59		187 ctns mxd. veg.	09/15/92	10/05/92	1,613.00
60		115 ctns mxd. veg.	09/21/92	10/09/92	1,555.00
61		303 ctns mxd. veg.	10/05/92	10/24/92	1,780.50adj
		Amount Past Due and Unpaid			**$11,871.00**

TRANS NO	SELLER & ADDRESS	QUANTITY & COMMODITY	DATE ACCEPTED	DATE PAYMENT DUE	AGREED PURCHASE PRICE
62	Mike Benben, Inc.	325 ctns mxd. veg.	08/21/92	08/31/92	$1,285.00
63	Sturtevant, WI	175 ctns mxd. veg.	10/09/92	10/19/92	875.00adj
		Amount Past Due and Unpaid			**$2,160.00**
64	Tem-Cole, Inc.	100 ctns radishes	08/23/92	09/22/92	$762.50
65	McClure, OH	50 ctns radishes	08/29/92	09/28/92	287.50
66		50 ctns radishes	09/03/92	10/03/92	287.50
67		100 ctns radishes	09/15/92	10/15/92	562.50
68		100 ctns radishes	09/18/92	10/18/92	562.50
69		40 ctns radishes	10/09/92	11/08/92	300.00
		Amount Past Due and Unpaid			**$2,762.50**
70	O.P. Murphy & Sons Soledad, CA	1600 ctns tomatoes	08/25/92	09/04/92	$2,740.00
		Amount Past Due and Unpaid			**$2,740.00**
71	H.C. Schmeiding	100 ctns sweet potatoes	08/28/92	09/18/92	$1,100.00
72	Produce Co., Inc.	100 ctns sweet potatoes	10/02/92	10/23/92	925.00
73	Springdale, AR	250 ctns sweet potatoes	10/23/92	11/13/92	1,912.00
		Amount Past Due and Unpaid			**$3,937.00**
74	Coastal Berry Corp. Watsonville, CA	2688 ctns strawberries	09/15/92	10/06/92	$5,417.30
		Amount Past Due and Unpaid			**$5,417.30**
75	Hiatt Produce St. Charles, IL	1584 ctns tomatoes	09/16/92	10/05/92	$10,873.90
		Amount Past Due and Unpaid			**$10,873.90**
76	Dole Fresh Fruit Co.	284 ctns bananas	09/19/92	09/29/92	$3,013.24
77	Charlotte, NC	416 ctns bananas	09/27/92	10/07/92	3,893.76
78		984 ctns bananas	09/29/92	10/09/92	9,919.49
79		784 ctns bananas	09/29/92	10/09/92	7,926.24
80		974 ctns bananas	10/01/92	10/11/92	9,829.64
81		784 ctns bananas	10/04/92	10/14/92	7,926.24
82		984 ctns bananas	10/06/92	10/16/92	9,948.24
83		984 ctns bananas	10/10/92	10/20/92	9,240.24
84		506 ctns bananas	10/12/92	10/22/92	4,751.34

TRANS NO	SELLER & ADDRESS	QUANTITY & COMMODITY	DATE ACCEPTED	DATE PAYMENT DUE	AGREED PURCHASE PRICE
85	Dole Fresh Fruit Co.	984 ctns bananas	10/14/92	10/24/92	8,807.76
86	Charlotte, NC	416 ctns bananas	10/15/92	10/25/92	3,698.24
87	(cont.)	984 ctns bananas	10/21/92	10/31/92	8,807.76
		Amount Past Due and Unpaid			**$87,762.19**
88	Fresh Farm Products, Inc. Americus, GA	260 ctns mxd. veg.	10/01/92	10/11/92	$1,240.00
		Amount Past Due and Unpaid			**$1,240.00**
89	Georgia Vegetable Co., Inc. Tifton, GA	160 ctns cucumbers	10/09/92	10/19/92	$440.00
		Amount Past Due and Unpaid			**$440.00**
90	Brown & Loe, Inc. Kansas City, MO Origin: WA	996 ctns apples	10/10/92	10/31/92	$8,027.00
		Amount Past Due and Unpaid			**$8,027.00**
91	Midwest Brokerage	310 ctns mxd. veg.	10/16/92	10/26/92	$1,711.50
92	Olathe, KS	290 ctns mxd. frt. & veg.	10/29/92	11/19/92	2,987.50
93		70 ctns grapefruit	10/29/92	11/19/92	542.50
94		302 ctns mxd. frt. & veg.	11/02/92	11/23/92	2,382.25
		Amount Past Due and Unpaid			**$7,623.75**
95	North Florida Tomatoes, Inc. Quincy, FL	1600 ctns tomatoes	10/19/92	11/09/92	$20,480.00
		Amount Past Due and Unpaid			**$20,480.00**
96	J.S. McManus Produce Co. Inc. Weslaco, TX	210 ctns cucumbers	10/22/92	11/01/92	$1,617.50
		Amount Past Due and Unpaid			**$1,617.50**
97	Norden Fruit Co. Los Angeles, CA	1188 ctns tomatoes	11/02/92	11/23/92	$10,537.30
		Amount Past Due and Unpaid			**$10,537.30**

Total Amount Past Due and Unpaid These 21 Shippers $500,370.54

IV

By reason of the facts alleged in paragraph III herein, respondents wilfully violated Section 2(4) of the PACA (7 U.S.C. § 499b(4)). The failure of respondents to make full payment promptly of the agreed purchase prices for the perishable agricultural commodities that they purchased, received and accepted in interstate and foreign commerce, constitutes wilful, flagrant and repeated violations of Section 2(4) of the PACA (7 U.S.C. § 499b(4)).

WHEREFORE, this complaint shall be served upon the respondents for the purpose of determining whether the respondents have wilfully violated the PACA. The respondents shall have twenty (20) days after receipt of this complaint in which to file an answer or answers with the Hearing Clerk, United States Department of Agriculture, Washington, D.C. 20250, in accordance with the Rules of Practice governing proceedings under the PACA (7 C.F.R. § 1.130 *et seq.*). Failure to file an answer shall constitute an admission of all the material allegations of this complaint.

The complainant requests:

1. That unless the respondents fail to file an answer within the time allowed, or admit all the material allegations of this complaint, this proceeding be set for oral hearing in conformity with the Rules of Practice governing proceedings under the PACA; and

2. That pursuant to Section 8 of the PACA (7 U.S.C. § 499h), the Administrative Law Judge find that respondents have committed wilful, flagrant and repeated violations of Section 2(4) of the PACA (7 U.S.C. § 499b(4)), and order that such violations be published.

Issued at Washington, D.C.

this 23rd day of August

/s/ Charles R. Brader
Director
Fruit and Vegetable Division
Agricultural Marketing Service

/s/ Eric Paul
Eric Paul
Attorney for Complainant
Telephone: (202) 720-2460

* * *

[p. 557] control of the business on a day-to-day basis.

A. Okay, it's not a violation.

Q. And you were sitting in the room, I think, when I questioned Ms. Holloway about the fact that there are no age requirements for a PACA license, no experience requirements, financial requirements, or educational requirements, and you heard her answers. Isn't that correct?

A. Yes. I heard the answers.

Q. And you have no basis to disagree with the answers which she gave to those questions, do you?

A. None.

Q. Now, you were asked a question –

JUDGE BERNSTEIN: Let me just go off the record.

(Off the record.)

JUDGE BERNSTEIN: Back on the record.

BY MR. KATZ:

Q. You were asked a question on direct by Mr. Paul about someone who is actually asserting management and control of a PACA licensee. Do you remember that question? And I raised an objection relating to what it meant to manage and control a business?

[p. 558] A. Yes, I remember.

Q. Would you explain in detail how you understood manage and control when you answered that question?

A. I don't know if I can give a general – in that sense, I can give, without getting too specific – I'll try to do that.

Whenever – here I'm only referring to corporations because individuals, you don't have to establish, of course, anything pertaining to responsibly connected. An individual is responsible for what happens in his own firm. Partners are – even though they're covered by responsibly connected, they are generally – and I admit I'm no attorney – held responsible jointly and severally for the actions of the partnership. So, I'm only talking about corporations.

If in an investigation it is found that an individual – a person in a corporation who is not an officer, a director, or a holder of more than 10 percent of the stock – has committed actions of a character prohibited by the Act or is in the process of doing it, and in any way they have been responsible – and I realize [p. 559] "responsible" can be just as vague as "control" – but responsible for violations of the Act. And the corporation, of course, is the one ultimately responsible because they're held as responsible for the actions of their employees.

But if the actions are deemed serious enough by the Agency, then it is possible to also bring an action against that person, holding them equally responsible with the corporation and also seeking the same sanctions, or the equivalent sanction because usually – recently there was a decision in New York but there the person who worked for the firm had his own license, and both he and the New York firm had their license revoked. The parent firm, or the firm that employed him, is appealing.

But in this case, yes. Even if the person does not have a license, the Agency feels it has the obligation to examine the facts and circumstances, and if it is deemed serious enough, to bring the action against the individual and the corporation.

Q. In the situation where an employee buyer in a produce company has full authority on a [p. 560] day-to-day basis to contract to buy produce and to sell produce, contract for the shipment of that produce, but he doesn't own the firm, is he individually obligating himself to pay for those contracts, or is it an obligation of the firm that he works for?

A. I feel it would be the Agency's responsibility in that case to show that he not only had knowledge – I mean real knowledge, constructive knowledge – that the firm wasn't going to be able to pay its bills and that he actively participated in that, but that he had maybe not the total authority or the top authority, but at least some authority for either promising or authorizing payment for the loads and knew when he bought them that this payment would not be – or promising, and knew when he bought the loads that this payment was not going to be forthcoming.

Q. Well, the fact that a buyer may get a call –

JUDGE BERNSTEIN: Okay. I think Mr. Clark has answered very knowledgeably, but what we're getting into is the issue that I must decide.

Now, I've said that I'll hear his views and I'll hear other views, but this case has

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UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

PACA Docket No. D-94-524

In re:	:	
John J. Conforti d/b/a C&C Produce and C&C Produce, Inc.	:	**OBJECTION TO ORDER TAKING OFFICIAL NOTICE**
Respondents	:	

Respondent objects to the Order Taking Official Notice for the following reasons.

The Order Taking Official Notice states that pursuant to the Rules of Practice, 7 C.F.R. § 1.145(i), official notice is taken of three documents in connection with *In re: Midland Banana & Tomato Co., Inc.* and *In re: Royal Fruit Co., Inc.*, PACA Docket Nos. D-93-548 and D-93-549, as follows:

1) Decision and Order filed July 26, 1994 by the ALJ;

2) Complaint filed August 25, 1993 in D-93-549; and

3) Transcript of a portion of the testimony at the hearing held on March 23, 1994 of John M. Clark, Senior Marketing Specialists, Trade Practices Section, PACA Branch (Tr. 557-60).

The Order allowed respondent, at his request, an opportunity "to show the contrary" pursuant to 5 U.S.C. § 556(e). Respondent requested an opportunity to object to the Order, and now sets forth his objections to the Order Taking Official Notice.

The pertinent provision of 5 U.S.C. § 556(e) states,

> When an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary.

A distinction is made between officially noticing legislative facts and adjudicative facts, Davis and Pierce, *Administrative Law Treatise,* Third Ed., §§ 10.5 and 10.6. The distinction is widely accepted. *Association of National Advertisers, Inc. v. FTC,* 627 F.2d 1151, 1161 (D.C. Cir. 1979). Legislative facts are general facts regarding issues of law and policy that do not arise from the particular dispute, while adjudicative facts develop from and are peculiar to the specific parties and events in the case. *United States v. Gould,* 536 F.2d 216, 219-221 (8th Cir. 1976). Davis, *supra,* § 10.5. It is easier to take judicial notice of legislative facts than adjudicative facts. *Id.,* § 10.6. Officially noticing facts that are adjudicative, disputed and critical is improper and evidence of such facts must be presented at a formal hearing under the APA. *Id.* § 10.6.

In this case, the fundamental problem with the Order Taking Official Notice is that it cites no facts. Instead, three (3) documents are the subject of official notice. The first is a Decision and Order consisting of 36 pages, in which there are 47 numbered paragraphs of "Findings of Fact", many of which contain more than one finding of fact. The Discussion section of the Decision and Order also contains 21 pages of discussion in which there are additional findings and inferences of fact. The second document is a complaint which contains only allegations

of facts. The last document is a four (4) page excerpt of testimony by a USDA employee regarding his opinion about individual liability for PACA violations.

In addition to not citing any facts, the Order is noticing documents from a case which:

a) respondent was not a party to and did not participate in;

b) was hotly contested as to many facts (see the Discussion section in the ALJ's Decision and Order); and

c) is now on appeal to the Judicial Officer regarding findings of fact.

Thus, the Order Taking Official Notice violates the APA because it fails to advise of the material facts that are being noticed. As a result, respondent is deprived of his right "to show the contrary." Furthermore, and more significantly, officially noticing these documents, or any particular facts from these documents[1], is far beyond what is contemplated by "official notice" in the Rules of Practice or the APA, and would violate the Rules of Practice, the APA and the Due Process Clause of the Fifth Amendment to the U.S. Constitution.

The Order cites *In re Dane O. Petty*, 42 Agric. Dec. 1729 (1984), regarding the taking of official notice under the Rules of Practice. In the *Petty* case, the Judicial Officer

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[1] There do not appear to be any legislative facts in these documents. All of the facts appear to be adjudicative, i.e., they involve only events and circumstances peculiar to the case at hand, and, as noted above, none are final findings of fact and many are disputed.

took official notice of a Colorado law on health requirements for admission of livestock and poultry into Colorado. The law was referred to at the hearing in the case and the Judicial Officer noted that its admission was superfluous because the testimony in the case adequately explained the law. The Judicial Officer officially noticed the law "for the purpose of corroborating the uncontradicted testimony in the proceeding." *In re Dane O. Petty, supra,* p. 1730. This is a classic case of officially noticing legislative facts. The Colorado law was not an adjudicative fact that was disputed and critical to the outcome of the case. However, the *Petty* case is not authority for officially noticing documents without specifying the facts to be noticed, especially when such documents are full of disputed adjudicative facts.

The APA and the Rules of Practice set forth the procedural mechanisms to assure that a respondent is given due process, i.e. notice and meaningful opportunity to be heard. Entering these documents into evidence in this case by "official notice" deprives respondent of notice and a meaningful opportunity to contest the evidence against him, and so violates the Rules of Practice, the APA and the Due Process Clause of the Fifth Amendment to the U.S. Constitution.

For the foregoing reasons, respondent objects to the Order Taking Official Notice and requests that it be rescinded.

McCARRON & ASSOCIATES

By: /s/ Stephen P. McCarron
Stephen P. McCarron
4455 Connecticut Avenue, N.W.
Washington, D.C. 20008
(202) 364-0400

Attorney for Respondent

In Re: Dr. Dane O. Petty. VA Docket No. 21. Decided November 21, 1984.

Objections to Notice and Petition Denied.

Sally Lorang, for complainant.
Earl Luna, Dallas, Texas, for respondent.

Decision by Donald A. Campbell, Judicial Officer.

ORDER DENYING OBJECTIONS TO OFFICIAL NOTICE AND PETITION FOR FOR RECONSIDERATION

On October 30, 1984, complainant filed the Health Requirement Governing Admission of Livestock and Poultry into Colorado, 8CCR1201-1, pursuant to the Judicial Officer's request filed October 29, 1984, which were referred to at the hearing (Tr. 233, originally numbered page 31 of October 1, 1982, Hearing Transcript). Respondent objects to the taking of official notice of this Colorado Quarantine Law on the grounds that the rules of practice do not authorize the Judicial Officer to take official notice of any document, and this document is superfluous.

The rules of practice, which I participated in drafting, permit the Judicial Officer, as well as the Administrative Law Judges, to take official notice of appropriate documents. The rules of practice provide, 7 CFR § 1.145(i):

> (i) *Decision of the Judicial Officer on Appeal.* A [sic] soon as practicable after the receipt of the record from the Hearing Clerk, or, in case oral argument was had, as soon as practicable thereafter, the Judicial Officer, upon the basis of and after due consideration of the record and any

> matter of which official notice is taken, shall rule on the appeal.

Respondent would rewrite the latter half of the quoted sentence to read "upon the basis of and after due consideration of the record and any matter of which official notice was taken by the Administrative Law Judge, shall rule on the appeal." However, that is not how the rules of practice read, and it is not what was intended by the rules of practice.

Since the testimony in this case adequately explains the routine Colorado quarantine requirements, respondent correctly argues that the Colorado Quarantine Law is superfluous. But official notice is, nonetheless, being taken of the Colorado Quarantine Law for the purpose of corroborating the uncontradicted testimony in this proceeding.

Respondent argues that the evidence does not support numerous findings and conclusions by the Judicial Officer. I disagree. Respondent's petition for reconsideration is denied for the reasons set forth in the decision filed herein on October 31, 1984. However, some of respondent's contentions will be discussed briefly below. The paragraph numbers below correspond to the numbered paragraphs in respondent's petition for reconsideration.

1. Respondent argues that the "part of Finding number 11 on page 11 of the decision stating that the card test is 100% accurate if it shows a positive reaction is not supported by the weight of credible evidence." However, Dr. Van Hooser testified (Tr. 1148):

Q. Are you saying the card test is a hundred percent accurate?

A. If it shows a positive reaction, yes, we say it is 100 percent accurate.

But we do not say that it picks up 100 percent of the reactors in any given population of animals.

Although Dr. Van Hooser testified that the discrepancy between a card test in the field and at the laboratory "can be either way" (Tr. 858), he further testified that he could only remember two instances, or perhaps a "few more," out of "[w]ell over 50,000" card tests that he was familiar with in his career (Tr. 859), where a positive brucellosis card test in the field was found to be negative by the laboratory (Tr. 924-24A). Hence it is clear that, for all practical purposes, the card test is 100% accurate when it shows a positive reaction.

With respect to the instances where Dr. Van Hooser observed a negative field test that was found to be positive in the laboratory, although Dr. Van Hooser initially stated that the number of such discrepancies was "more than a hundred" (Tr. 860, line 6), after giving the matter further thought, he stated on the same page of the transcript that "it might not even be a hundred" (Tr. 860, lines 15-16), and in the following answer stated, "I'll stand pat on a hundred, but beyond that I don't know" (Tr. 860, lines 19-20). This emphasizes that even where the field card test is negative, the chance that the laboratory will disagree is extremely small (less than 1 in 500 instances).

But it is not really important here how often the laboratory differs with the field test when the field test is

negative since the relevant issue here is how often the laboratory would have failed to detect the 25 to 40 *positive* tests detected by respondent in his Colorado tests, if respondent had submitted the proper blood samples to the laboratory (see Decision, at 70-71). As stated in the Decision, at 71, it is not within the realm of reasonable statistical possibility that the Texas laboratory would have found only two positive results showing brucellosis reactors, when respondent found at least 25, unless respondent made a deliberate effort to withhold the positive brucellosis reactor blood samples.

3. Respondent erroneously argues that paragraph III of the complaint states that "the State of Colorado did not allow the card test" while "the evidence is to the contrary." However, paragraph III of the complaint states that Colorado did not allow the card test "in field testing cattle for brucellosis."

As stated in the Decision, at 75, note 47, it would have been more precise to allege that Colorado did not allow the card test in "farm" testing cattle for brucellosis, since Colorado allowed officially approved livestock market veterinarians to use the card test at approved livestock markets in Colorado for animals being sold through approved markets, which is sometimes regarded as field testing (Tr. 1201-02). However, as stated in the Decision, at 74-81, the complaint is adequate for the purposes of this administrative proceeding.

9. Respondent contends, without a record citation, that Dr. Henry testified that respondent told Pope to contact the Colorado authorities. That is not true. Dr. Henry was merely repeating respondent's unsworn, self-

serving statement made to Dr. Henry. The Judicial Officer's reasons for not giving any weight to respondent's self-serving, unsworn statement to the effect that respondent told Pope to contact the Colorado authorities is set forth in the Decision, at 85-88.

17. Respondent argues that the "Judicial Officer erred in finding that Respondent must follow Colorado rules [relating to reporting diagnosed or suspected cases of diseases of livestock] even though he is not accredited in Colorado (Decision, p. 82)." However, the requirement as to the reporting of diagnosed or suspected cases of diseases of livestock is not a Colorado requirement – it is a national requirement. It is set forth in the Standards for Accredited Veterinarians (9 CFR § 161.2(f)), quoted in the Decision, at 81.

18. Respondent erroneously argues that the "Judicial Officer erred in inferring (Decision, p. 83 *et seq.*) that 9 CFR § 161.2(f) requires any particular form or manner of report or that such report be made personally." No such inference was drawn by the Judicial Officer.

Although no particular form or manner of report is required, there is at least a requirement that there be a report. Respondent did not make a report to anyone, in any form or manner, and he did not ask anyone to make the report for him (Decision, at 83-88). If respondent had designated his assistant or secretary to make the report, that would have been acceptable practice. But it would not be acceptable practice to ask a farmer or rancher for whom tests are made to make the report, for the reasons set forth in the Decision, at 85. Moreover, the record is

quite clear that respondent did not even request Pope to make the required report.

For the foregoing reasons, and the reasons set forth in the Decision, respondent's petition for reconsideration should be denied.

ORDER

Official notice is taken of the Health Requirement Governing Admission of Livestock and Poultry into Colorado, 8CCR1201-1, filed by complainant on October 30, 1984, and discussed in the Judicial Officer's Second Order as to Colorado Quarantine Law filed October 31, 1984.

Respondent's petition for reconsideration is denied.

Supreme Court, U.S.
FILED
JUL 1 1996
CLERK

No. 95-1675

In the Supreme Court of the United States

OCTOBER TERM, 1995

JOHN J. CONFORTI, d/b/a C & C PRODUCE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether an agency adjudicator violated the Administrative Procedure Act or the Due Process Clause of the Fifth Amendment by taking official notice of facts established in another administrative proceeding, where the parties were given an opportunity to contest the officially noticed facts and substantial other evidence supported the adjudicator's findings.

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OPINIONS BELOW

The initial opinion of the court of appeals is reported at 69 F.3d 897. The revised opinion of the court of appeals (Pet. App. 1-11) is reported at 74 F.3d 838. The decision and order of the Judicial Officer of the Department of Agriculture (Pet. App. 12-71) is reported at 54 Agric. Dec. 649.

JURISDICTION

The judgment of the court of appeals was entered on November 9, 1995. A petition for rehearing was denied on January 18, 1996. The petition for a writ of certiorari was filed on April 17, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Perishable Agricultural Commodities Act of 1930 (PACA), 7 U.S.C. 499a *et seq.*, requires wholesale produce dealers to obtain licenses from the United States Department of Agriculture (USDA). See 7 U.S.C. 499c(a). A PACA licensee must obtain approval from USDA before employing an individual who is "responsibly connected" to a corporation that has failed to satisfy USDA reparation orders. 7 U.S.C. 499h(b)(3). At the time of the events in question, PACA defined an individual as "responsibly connected" to such a corporation if he or she served as an officer or director of the corporation, or held more than ten percent of its outstanding stock. 7 U.S.C. 499a(b)(9).[1] USDA is authorized to approve a licensee's employment of a responsibly connected individual "if the licensee furnishes and maintains a surety bond in form and amount satisfactory to the Secretary [of Agriculture]." 7 U.S.C. 499h(b).

2. Petitioner operates C & C Produce, a produce dealership licensed under PACA. Pet. App. 2. In June, 1993, petitioner hired Joseph Cali to work for C & C Produce. *Ibid.* On June 24, 1993, petitioner received a letter from USDA informing him that Cali was "responsibly connected" to Royal Fruit Co., a corporation with several outstanding reparation orders. *Ibid.* The letter stated that petitioner could not employ Cali after July 24, 1993, unless petitioner posted a bond. The required bond was later set at

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[1] In 1995, the definition of "responsibly connected" persons under PACA was amended. See Perishable Agricultural Commodities Act Amendments of 1995, Pub. L. No. 104-48, § 12(a), 109 Stat. 430 (to be codified at 7 U.S.C. 499a(b)(9)) (discussed at pages 11-12, *infra*).

$100,000. *Ibid.* Neither petitioner nor Cali disputed Cali's "responsibly connected" status.

Petitioner did not terminate Cali's employment on or before July 24; nor did petitioner post the required bond. Cali continued to work for petitioner until November 19, 1993. In the meantime, USDA warned petitioner at least five times that Cali's continued employment could result in suspension or revocation of petitioner's PACA license. Pet. App. 3; Gov't C.A. Br. 6. Although petitioner made good faith attempts to secure the required bond throughout the period of Cali's employment (Pet. App. 2-3), petitioner failed to secure the bond. Petitioner was on notice that securing a bond was a "prerequisite" to his firm's employment of Cali. Gov't C.A. Br. 6.

3. Three months after petitioner terminated Cali, USDA filed an administrative complaint against petitioner, seeking to revoke his PACA license due to his unlawful employment of Cali. Pet. App. 3. After a hearing, an administrative law judge (ALJ) found that petitioner had violated PACA and suspended his license for 30 days. *Ibid.* The ALJ found that Cali had been "responsibly connected" to Royal Fruit. *Id.* at 20-21. That finding was substantially supported by evidence in the administrative record, including several letters from USDA to Royal Fruit and to petitioner. Gov't C.A. Br. 24-26. Petitioner never disputed Cali's "responsibly connected" status before the ALJ, and never objected to the admissibility of the letters as proof of that status. In fact, petitioner's counsel at the administrative hearing conceded that "Mr. Cali was determined to be somebody responsibly connected with Royal Fruit Co." *Id.* at 28.

4. Both USDA and petitioner appealed the ALJ's decision to the USDA Judicial Officer (JO). The JO

affirmed the ALJ's holding that petitioner had violated PACA, and increased the term of suspension to 90 days. Pet. App. 3. Pursuant to 5 U.S.C. 556(e) and 7 C.F.R. 1.145(i), the JO took official notice of several documents concerning Cali that had been filed in two other administrative proceedings. See Pet. App. 72-73. The officially noticed documents were: (i) a Decision and Order filed on July 26, 1994, in *In re Midland Banana & Tomato Co.*, No. D-93-548 (Agric. July 26, 1994), and *In re Royal Fruit Co.*, No. D-93-549 (Agric. July 26, 1994) (Pet. App. 74-113); (ii) the Complaint filed by USDA in *Royal Fruit* (*id.* at 114-123); and (iii) a transcript of a portion of testimony from the *Royal Fruit* hearing (*id.* at 124-126). Those documents lent additional support to the finding that Cali was "responsibly connected" with Royal Fruit. *Id.* at 76, 78-79, 93.

In accordance with 5 U.S.C. 556(e), the JO gave petitioner an opportunity to challenge the information contained in the officially noticed documents. See Pet. App. 72-73. Petitioner, again, did not dispute that Cali was responsibly connected to Royal Fruit. Instead, petitioner filed an "Objection to Order Taking Official Notice," which challenged the propriety of the JO's use of official notice. *Id.* at 127-129.

5. Petitioner sought review of the JO's order, which was the final decision of the Secretary of Agriculture, in the court of appeals. 28 U.S.C. 2342; 7 C.F.R. 2.35. The court of appeals upheld the finding that petitioner violated PACA, but reinstated the 30-day suspension imposed by the ALJ. Pet. App. 1, 11.

The court of appeals rejected petitioner's assertion that "the record lack[ed] evidence indicating that Cali met PACA's definition of a responsibly connected individual." Pet. App. 4. The court noted that the JO

had taken official notice of the *Royal Fruit* decision, in which "the ALJ found that Cali was the President and a director of Royal Fruit and that he held 50 percent of the company's stock." *Ibid.* The court held that both USDA regulations and agency rules of practice permit the use of official notice under these circumstances. The court further noted that the JO had given petitioner the "required opportunity to object to the order taking official notice." *Id.* at 5 (citing 5 U.S.C. 556(e)).

The court of appeals also rejected petitioner's arguments that (i) the JO was required to conduct a special hearing on the question of Cali's connection to Royal Fruit (Pet. App. 4); (ii) Cali was not responsibly connected to Royal Fruit because he played only a "minor role" in the management of that company (*id.* at 5); and (iii) petitioner did not violate PACA because the USDA led him to believe that he could continue to employ Cali while he made a good faith effort to obtain a bond (*id.* at 6-7).

ARGUMENT

1. Petitioner's primary contention before this Court is that the court of appeals misapplied the doctrine of official notice, thus allegedly violating petitioner's rights under the Administrative Procedure Act (APA) and the Due Process Clause of the Fifth Amendment. Although the court of appeals appears to have erred in its reliance on official notice, that error was harmless and does not warrant this Court's review.

This Court has recognized that administrative agencies have considerable discretion to allow the introduction of hearsay evidence in administrative proceedings. See *Richardson* v. *Perales*, 402 U.S. 389

(1971). Here, however, there is an applicable USDA regulation, 7 C.F.R. 1.141(g)(6), which permits a JO to take official notice, *inter alia*, of "such matters as are judicially noticed by the courts of the United States."[2]

As a general rule, "a court may not take judicial notice of proceedings or records in another cause so as to supply, without formal introduction of evidence, facts essential to support a contention in a cause then before it." *M/V American Queen* v. *San Diego Marine Constr. Corp.*, 708 F.2d 1483, 1491 (9th Cir. 1983) (citing 29 Am. Jur. 2d *Evidence* § 58 (1967)). "A court may take judicial notice of a document filed in another court not for the truth of the matters asserted in the other litigation, but rather to establish the fact of such litigation and related filings." *Liberty Mut. Ins. Co.* v. *Rotches Pork Packers, Inc.*, 969 F.2d 1384, 1388 (2d Cir. 1992) (citation omitted); see also *Dayco Corp.* v. *FTC*, 362 F.2d 180, 186 (6th Cir. 1966) ("It needs no argument to demonstrate that agencies may not take notice of the 'litigation facts' involved in a particular case; to do so would be to shift the burden of proof and make a mockery of the hearing procedure.") (citation omitted); 21 Charles A. Wright & Kenneth W. Graham, Jr., *Federal Practice and Procedure* § 5106 (Supp. 1996) ("If it were permissible

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[2] In full, 7 C.F.R. 1.141(g)(6) provides:

Official notice. Official notice shall be taken of such matters as are judicially noticed by the courts of the United States and of any other matter of technical, scientific, or commercial fact of established character: *Provided*, That the parties shall be given adequate notice of matters so noticed, and shall be given adequate opportunity to show that such facts are erroneously noticed.

for a court to take judicial notice of a fact because it has been found true in some other action, the doctrine of collateral estoppel would be superfluous."). Thus, the court of appeals apparently erred when it held that findings of fact from the *Royal Fruit* proceedings—in which it was determined that Cali was the President and a director of Royal Fruit, and that he held 50% of the company's stock—justified the JO's conclusion that Cali was responsibly connected to Royal Fruit. Pet. App. 4.[3]

Although the court of appeals' reliance on official notice appears to have been erroneous in light of the applicable USDA regulation, that error was harmless. In *United States* v. *Pierce Auto Lines*, 327 U.S. 515, 530 (1946), this Court noted that harmless error analysis applies to an agency's erroneous use of official notice to rely on matters outside the adminstrative record. The Court declined to "make a fetish of sticking squarely within the four corners of the specific record in administrative proceedings," and held that "the mere fact that the determining body has looked beyond the record proper does not invalidate its action unless substantial prejudice is shown to result." *Ibid.*; see also *American Trucking Ass'ns* v. *Frisco Transp. Co.*, 358 U.S. 133, 144 (1958). Here, abundant other evidence supported the finding that Cali was responsibly connected to Royal Fruit. Petitioner was, moreover, given an opportunity to

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[3] The cases cited by the court of appeals, *Hart* v. *Commissioner*, 730 F.2d 1206, 1207 n.4 (8th Cir. 1984), and *United States* v. *Jackson*, 640 F.2d 614, 617 (8th Cir.), cert. denied, 454 U.S. 1057 (1981), do not support use of official notice to adopt factual findings from another proceeding.

refute the officially noticed facts. Thus, petitioner was not prejudiced by the court of appeals' error.

The critical issue before USDA and the court of appeals was whether, in employing Cali, petitioner unlawfully employed an individual who was "responsibly connected" to a corporation that had failed to satisfy USDA reparation orders. 7 U.S.C. 499h(b)(3). The statute defines a person as "responsibly connected" to a corporation if he serves as an officer or director of the corporation, or if he holds more than ten percent of its outstanding stock. 7 U.S.C. 499a(b)(9).

Aside from the officially noticed material, the administrative record in this case contains ample support for the finding that Cali was "responsibly connected" to Royal Fruit, a company subject to outstanding reparation orders. By letter dated May 18, 1993, USDA had informed Royal Fruit of its ineligibility to obtain a new PACA license due to its nonpayment of a reparation award. That letter, which was introduced at petitioner's initial hearing by stipulation of counsel, stated:

> [T]he officers, directors, or holders of more than 10 percent of the stock in your firm cannot be employed by or affiliated in any capacity with any other licensee under the Act without the approval of the Secretary of Agriculture and the posting of a suitable surety bond. Our records show Joseph S. Cali, Beverly Heimann, and Jeffrey B. Heimann to have held these positions. As officers, directors, and/or stockholders, it has been determined pursuant to Section 47.49, of the enclosed Rules of Practice, that they were responsibly connected

> with Royal Fruit Co., Inc., at the time of the violation.

Gov't C.A. Br. 25. In addition, the record contains several other letters, sent to petitioner by USDA, that state that "[t]he Department's records show Mr. Cali was responsibly connected with Royal Fruit Co., Inc. as the president and stockholder during the period of violations." *Id.* at 24-26. Petitioner did not dispute the admissibility or the accuracy of those letters as proof of Cali's "responsibly connected" status. The additional documents admitted by official notice were not made part of the record until the subsequent proceeding before the JO, after the ALJ had ruled against petitioner. Those documents lent further support to the finding that Cali was responsibly connected, but were not necessary to establish Cali's status. Indeed, petitioner concedes that "[n]either the [JO] nor the ALJ in Petitioner's case relied on the Royal Fruit/Midland Banana findings to conclude that Cali was responsibly connected." Pet. 11-12.

It is also relevant that petitioner was given an opportunity to contest the accuracy of the material that was officially noticed. The JO's Order Taking Official Notice afforded petitioner ten days to "show the contrary," as required by the APA. Pet. App. 72; 5 U.S.C. 556(e).[4] By giving petitioner an "opportunity

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[4] The pertinent section of the APA, 5 U.S.C. 556(e), provides:

> When an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary.

to show the contrary," the JO also complied with 7 C.F.R. 1.141(g)(6), which requires that "the parties shall be given adequate opportunity to show that such facts are erroneously noticed." Petitioner never offered any evidence to contradict the finding that Cali was responsibly connected with Royal Fruit. Instead, petitioner filed an "Objection to Order Taking Official Notice" (Pet. App. 127-130), which challenged only the propriety of the JO's use of official notice under the circumstances.

Petitioner's allegation that he was "confronted with facts used against him after a decision was rendered without an opportunity to challenge the facts" (Pet. 12) is incorrect. Petitioner's "Objection to Order Taking Official Notice" indicates that petitioner was indeed aware of the facts to be noticed; his objection protests the potential admission of "an adjudicative fact that [is] disputed and critical to the outcome of the case." Pet. App. 130. Moreover, the only issue in this case was whether petitioner had employed an individual who was responsibly connected to a corporation with outstanding USDA reparation orders, and the officially noticed documents obviously established that Cali was so connected. Petitioner therefore plainly had notice of the material facts and an opportunity to rebut those facts. See, *e.g.*, *Bowman Transp., Inc.* v. *Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 288 (1974); *American Trucking Ass'ns* v. *Frisco Transp. Co.*, *supra*.

2. Petitioner asserts that "the Judicial Officer also admitted into the record another document which he had not referenced in the Order Taking Official Notice—part of the agency's brief in the Royal Fruit/Midland Banana cases." Pet. 10 (citing Pet.

App. 53-56). The JO's decision, however, clearly identifies the brief "admitted" as one filed in the instant case, not in *Royal Fruit/Midland Banana*. Thus, there is no merit to petitioner's allegation of a "strange twist" based on the admission of "a brief that had never been referenced in the Conforti case." Pet. 10-11.

3. Petitioner contends that "there is no finding that Cali [was responsibly connected with Royal Fruit] in the relevant year of 1993 when Royal Fruit's PACA license was suspended for failing to pay reparation awards." Pet. 12. Petitioner has waived that claim because he did not raise it before the ALJ or before the JO. In any event, evidence in the record establishes that Cali was responsibly connected with Royal Fruit "at the time of the violation." Gov't C.A. Br. 25.

4. Finally, petitioner indirectly suggests that his case warrants reconsideration because of an intervening amendment in the statutory definition of "responsibly connected" persons. Pet. 13. At the time of petitioner's initial hearing, governing Eighth Circuit precedent required the application of a "per se" rule under which all officers, directors and ten-percent shareholders of a corporation were automatically deemed "responsibly connected." See *Pupillo* v. *United States*, 755 F.2d 638, 643 (8th Cir. 1985). On November 15, 1995, the PACA provision defining "responsibly connected" persons was amended to adopt a "rebuttable presumption" rule, under which an officer, director or ten-percent shareholder could avoid "responsibly connected" status by proving, by a preponderance of the evidence, that he or she had no "active[ ] involve[ment] in the activities resulting in a violation of [PACA]." Perishable Agricultural Com-

modities Act Amendments of 1995, Pub. L. No. 104-48, § 12(a), 109 Stat. 430 (to be codified at 7 U.S.C. 499a(b)(9)). Petitioner is not entitled to reconsideration under the new standard, however, because the 1995 amendments to PACA were adopted prospectively. See *Landgraf* v. *USI Film Prods.*, 114 S. Ct. 1483, 1500-1501 (1994).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1996